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### NLRB v. Canning Featuring the All-Powerful Senate: The National Labor Relations Board's Journey to Extinction

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# **NLRB V. CANNING FEATURING THE ALL-POWERFUL SENATE: THE NATIONAL LABOR RELATIONS BOARD'S JOURNEY TO EXTINCTION**

## **I. INTRODUCTION**

Imagine a world where unions and individual workers are unable to guarantee their rights.<sup>1</sup> Grace Johnson, a teacher at a local elementary school, is a member of the teachers' union, the American Federation of Teachers. Grace has taught at the same school for ten years, and she enjoys her job. Right before Christmas break, she arrives at the school to discover she has lost her job due to "budget reasons." Grace is shocked, and does not believe the budget is the only reason she was fired. She contacts her union representative, and he tells her he will look into her case. Later that month, the union representative finds out that Grace was replaced by a non-union teacher. The union representative informs Grace that the school may have discriminated against her because she is a union employee, which is an unfair labor practice. Grace really wants her job back, so the union representative files a complaint on her behalf with the regional National Labor Relations Board ("NLRB" or the "Board"), and the union representative assures her that there is a good chance the NLRB will overturn her discharge.

While Grace waits for a result from the regional NLRB, she struggles to pay her bills because the school refuses to continue paying her. The regional NLRB investigates and reports its findings to the Administrative Law Judge ("ALJ") who ultimately decides in favor of the school because Grace was paid more than the non-union teacher; therefore, budget cuts were a sufficient reason for her discharge. Grace is devastated, but the union representative informs her that her case can be appealed to the NLRB headquarters in Washington, D.C. Grace waits patiently, still without a job or an income for three more months. To her dismay, she learns the NLRB cannot decide any cases because it only has two members. Grace is left with nothing because there is no way to appeal her discharge.

All individuals should have a way to ensure their workers' rights, including unlawful discharge, regardless of the level of severity of an issue. If workers' rights and benefits were not guaranteed, the country would revert back to the times before the National Labor Relations Act

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<sup>1</sup> This scenario is fictional and solely the work of the author to illustrate the issues presented in this Note.

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("NLRA").<sup>2</sup> The NLRB provides regulation for employers, employees, and unions in disputes arising from the labor relationship.<sup>3</sup> If the NLRB became extinct, there would be no enforcement of employer, employee, or union benefits and rights.<sup>4</sup>

*NLRB v. Canning* arose after President Obama appointed three members to the NLRB during a three day recess the Senate took from January 3–6, 2012.<sup>5</sup> The Supreme Court held that the recess appointment power was more specific than President Obama interpreted.<sup>6</sup> It held that there must be a substantial break in the Senate – at least ten days – and the Senate can declare when they are in session.<sup>7</sup>

As a result, the holding invalidated the three recent appointments, setting off a domino effect.<sup>8</sup> Because the appointments were invalid, all of the cases that those three members were involved in may be appealed due to the lack of a quorum of valid members on the NLRB.<sup>9</sup> The re-evaluation of these cases and possible modification of decisions could have a grave impact on labor and employment law.<sup>10</sup>

<sup>2</sup> See 29 U.S.C. §§ 151–69 (2012) (showing the various parts of the NLRA).

<sup>3</sup> See NATIONAL LABOR RELATIONS BOARD, WHAT WE DO, <http://www.nlr.gov/what-we-do> [<http://perma.cc/Y7A4-PKKP>] (displaying the rights the NLRB protects and various ways to resolve issues); see also NATIONAL LABOR RELATIONS BOARD, RIGHTS WE PROTECT, <http://www.nlr.gov/rights-we-protect> [<http://perma.cc/Z96Z-JD57>] (explaining the rights the NLRB protects).

<sup>4</sup> See Ian Millhiser, *In Less Than 5 Years, Unions Could Lose Their Legal Rights – And It's the Supreme Court's Fault*, THINKPROGRESS (Jan. 13, 2014, 2:16 PM), <http://thinkprogress.org/justice/2014/01/13/3155141/5-years-unions-lose-legal-rights-supreme-courts-fault/> [<http://perma.cc/8PXD-9WPZ>] (predicting what would happen if the NLRB were powerless to act). The article states:

If the NLRB is powerless to act, there will be no one to enforce workers' rights to join a union without intimidation from their employer. No one to enforce workers' rights to join together to oppose abusive work conditions. And no one to make an employer actually bargain with a union.

*Id.*

<sup>5</sup> See *NLRB v. Canning*, 134 S. Ct. 2550, 2557–58 (2014) (elaborating on why Noel Canning filed a case against the NLRB); *infra* Part II.D (discussing further *NLRB v. Canning*).

<sup>6</sup> See *Canning*, 134 S. Ct. at 2577–78 (holding that the Recess Appointment Clause allows the President to fill any vacancy as long as the break in the Senate is of sufficient length).

<sup>7</sup> See *id.* at 2567 (elaborating on the Supreme Court's holding).

<sup>8</sup> See *id.* at 2578 (stating that President Obama's recess appointments were unconstitutional); Justin Keith et al., *The Supreme Court Declares a Recess for Recess Appointments*, THE NATIONAL LAW REVIEW (2014), <http://www.natlawreview.com/print/article/supreme-court-declares-recess-recess-appointments> [<http://perma.cc/4587-WU8K>] (explaining the reason why members were invalidated).

<sup>9</sup> See *infra* Part II.C (discussing the quorum requirement of the NLRB); see also *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 688 (2010) (holding that a valid quorum consists of three members).

<sup>10</sup> See *infra* Part III.A (analyzing the effect reexamining cases could have on the NLRB).

In the past five years, there have been three instances when the NLRB's membership fell to a mere two members on what is statutorily construed to be a five-member board.<sup>11</sup> Two of these three instances were solved through the presidential recess appointment power.<sup>12</sup> The holding in *NLRB v. Canning* made the use of the recess appointment power to fix shortages on the NLRB more difficult.<sup>13</sup> As a result, if the President and Senate do not agree on an appointment to the NLRB, the Board's membership will continue to fall as each member's term ends, and the board will eventually become non-operational.<sup>14</sup> Therefore, the NLRB needs to change its enabling statute in order to continue to operate effectively and prevent the changes to presidential recess appointment power from affecting its declining membership. This Note recommends that Congress amend 29 U.S.C. § 153 to ensure the NLRB is operational if appointments are not proposed by the President or confirmed by the Senate.<sup>15</sup>

First, Part II discusses the history of the NLRB, the developments and evolution of the Board, and the cases that have influenced the board's structure.<sup>16</sup> Next, Part III analyzes how the NLRB's operation has been disrupted in the past and will continue to be disrupted if no changes are made.<sup>17</sup> In addition, Part III proposes an amendment to the NLRB's enabling statute, correcting the NLRB's membership problems.<sup>18</sup> Finally,

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<sup>11</sup> See NATIONAL LABOR RELATIONS BOARD, MEMBERS OF THE NLRB SINCE 1935, <http://www.nlr.gov/who-we-are/board/members-nlr-1935> [http://perma.cc/HC47-V94G] (displaying that the NLRB has fallen to below three members twelve times since its creation with three of those times being in the past five years).

<sup>12</sup> See *id.* (showing that after *New Process Steel* in 2010, two members were recess appointed); see also *NLRB v. Canning*, 134 S. Ct. 2550, 2557–58 (2014) (explaining President Obama's recess appointment of three members to the NLRB).

<sup>13</sup> See *infra* Part II.D (reviewing *NLRB v. Canning*); see also *infra* Part II.E.1 (discussing the actions the NLRB has taken thus far).

<sup>14</sup> See U.S. CONST. art. II, § 2, cl. 2 (requiring Senate confirmation on presidential appointments); see also Ian Millhiser, *Why Senate Democrats Had To Invoke The "Nuclear Option,"* THINKPROGRESS (Nov. 21, 2013, 12:32 PM), <http://thinkprogress.org/justice/2013/11/21/2972671/senate-democrats-invoke-nuclear-option/> [http://perma.cc/FS2M-N5E4] [hereinafter Millhiser, *Nuclear Option*] ("[A]ll five slots on the NLRB are now filled by Senate-confirmed appointees—this solution is only temporary. NLRB members serve five year terms, so the Senate GOP will get another opportunity to shut down federal labor law when these terms expire . . .").

<sup>15</sup> See *infra* Part III.C.1 (explaining the language that this Note proposes to add to the NLRB's enabling statute); see also *The Legislative Process*, UNITED STATES HOUSE OF REPRESENTATIVES, [http://www.house.gov/content/learn/legislative\\_process/](http://www.house.gov/content/learn/legislative_process/) [http://perma.cc/NX2L-G5E4] (examining the process of amending a statute).

<sup>16</sup> See *infra* Part II (explaining the history and background to the problem this Note proposes to fix).

<sup>17</sup> See *infra* Part III.A–B (analyzing the NLRB's membership problem).

<sup>18</sup> See *infra* Part III.C (providing the proposed amendment's language).

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Part IV concludes with a summation of how the proposed amendment addresses the current problems.<sup>19</sup>

## II. BACKGROUND

The NLRB is an independent administrative agency that enforces and makes decisions regarding employee, employer, and union rights.<sup>20</sup> The NLRB was created in 1935 and has a variety of functions in the field of labor and employment law, including enforcing an employee's right to collectively bargain and join unions, and preventing unfair labor practices.<sup>21</sup> Throughout history, case law changed how members are appointed to the NLRB and how many members are required in order for the NLRB to function properly.<sup>22</sup> Specifically, *NLRB v. Canning* and *New Process Steel, L.P. v. NLRB* changed these practices.<sup>23</sup>

First, Part II.A explains the history of the NLRB.<sup>24</sup> Part II.B discusses how the NLRB is organized and the functions it performs.<sup>25</sup> Next, Part II.C discusses the quorum requirement of the NLRB and the impact of *New Process Steel, L.P. v. NLRB*.<sup>26</sup> Part II.D explains *NLRB v. Canning* and how it impacts the NLRB.<sup>27</sup> Part II.E establishes the NLRB's fallout since the *NLRB v. Canning* decision, and the Senate's desire to change the NLRB.<sup>28</sup> Finally, Part II.F introduces the Federal Communications Commission as a possible model for the NLRB.<sup>29</sup>

<sup>19</sup> See *infra* Part IV (concluding the reasons why this Note proposes the best solution).

<sup>20</sup> See NATIONAL LABOR RELATIONS BOARD, WHO WE ARE, <http://www.nlr.gov/who-we-are> [<http://perma.cc/3DTC-CFG4>] (stating that the NLRB is an independent agency and noting the rights it protects).

<sup>21</sup> See NATIONAL LABOR RELATIONS BOARD, THE 1935 PASSAGE OF THE WAGNER ACT, <http://www.nlr.gov/who-we-are/our-history/1935-passage-wagner-act> [<http://perma.cc/C85Y-LG38>] (explaining how the NLRB was created); see also Julia Di Vito, Note, *The New Meaning of New Process Steel, L.P. v. NLRB*, 46 WAKE FOREST L. REV. 307, 314 (2011) (establishing why the NLRB was created and what it does).

<sup>22</sup> See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 688 (2010) (requiring three members for there to be a valid quorum); see also *NLRB v. Canning*, 134 S. Ct. 2550, 2577–78 (2014) (stating that the Recess Appointments Clause can be used to appoint members only when there is a sufficient break in the Senate).

<sup>23</sup> See *infra* Part II.C–D (displaying the case law that has changed the NLRB).

<sup>24</sup> See *infra* Part II.A (outlining the history of the NLRB).

<sup>25</sup> See *infra* Part II.B (explaining the structure and function of the NLRB).

<sup>26</sup> See *infra* Part II.C (showing the impact that *New Process Steel* had on the NLRB).

<sup>27</sup> See *infra* Part II.D (analyzing the impact of *NLRB v. Canning*).

<sup>28</sup> See *infra* Part II.E (stating what the NLRB has already done).

<sup>29</sup> See *infra* Part II.F (examining the structure of the Federal Communications Commission).

A. *The History of the National Labor Relations Board*

The National Labor Relations Act of 1935 ("NLRA") created the NLRB.<sup>30</sup> The purpose of the NLRA was "[t]o diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, [and] to create a National Labor Relations Board . . . ."<sup>31</sup> The NLRA afforded workers with three rights: (1) the right to organize; (2) the right to bargain collectively; and (3) the right to engage in strikes, picketing, and other concerted activities.<sup>32</sup> The NLRB originally consisted of a three-member

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<sup>30</sup> See National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (displaying the original NLRA); see also S. 1958, 74th Cong., § 3(a) (1935) (stating the interest to establish the NLRB). The NLRA was created to allow workers to unionize and engage in collective bargaining. FRANK W. MCCULLOCH & TIM BORNSTEIN, *THE NATIONAL LABOR RELATIONS BOARD 3* (Ernest S. Griffith & Hugh Langdon Elsbree eds., 1974). The NLRA consists of three separate statutes: The National Labor Relations Act or Wagner Act of 1935, the Taft-Hartley Act of 1947, and the Landrum-Griffin Act of 1959. *Id.* at 16. When President Roosevelt signed the NLRA he issued a message:

A better relationship between labor and management is the high purpose of this act. By assuring the employees the right of collective bargaining it fosters the development of the employment contract on a sound and equitable basis. By providing for an orderly procedure for determining who is entitled to represent the employees, it aims to remove one of the chief causes of wasteful economic strife. By preventing practices which tend to destroy the independence of labor it seeks, for every worker within its scope, that freedom which is justly his.

*Id.* at 18.

<sup>31</sup> National Labor Relations Act, Pub. L. No. 74-198, pmbl., 49 Stat. 449, 449 (1935). "In the midst of economic strife, the Act sought to establish a uniform set of principles with employee free choice regarding unionization . . . ." John W. Bowers, *Section 8(a)(2) and Participative Management: An Argument for Judicial and Legislative Change in a Modern Workplace*, 26 VAL. U. L. REV. 525, 533 (1992). "Senator Wagner[] believed that enforcement of the right of employees to organize and bargain collectively with employers would achieve industrial peace and stability." *Id.* at 534.

<sup>32</sup> See JOHN E. HIGGINS, JR., *THE DEVELOPING LABOR LAW* 28-29 (H. Victoria Hedian et al. eds., 6th ed. 2012) (establishing the rights that the Wagner Act provided). Section 7 was one of the most important portions of the NLRA. *Id.* at 28. Section 7 stated: "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.*

Sections 3-6 of the NLRA created the NLRB. See *id.* at 29 (establishing the NLRB to administer the rights of the NLRA). Section 9 of the NLRA furthered this creation by giving the NLRB exclusive jurisdiction over questions of employee representation. *Id.* See also National Labor Relations Act, Pub. L. No. 74-198, §§ 3-6, 49 Stat. 449, 451-52 (1935) (displaying the structure of the NLRB as it was created in 1935). Sections 3 and 4 created structural guidelines for the NLRB. See *id.* §§ 3-4 (noting the structure and salary of the Board). Section 5 stated that the principle office would be the District of Columbia and that the Board or any agent of the Board may prosecute any inquiry necessary to its function in any part of the United States. *Id.* § 5. Next, Section 6 allowed the Board to make rules and regulations. *Id.* § 6.

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board with five-year staggered terms.<sup>33</sup> “The three-member NLRB was entrusted with administering both the unfair labor practice and the election provisions of the law.”<sup>34</sup> At the time of creation, the NLRB faced strong resistance from critics who felt it was one-sided in nature and should be unconstitutional.<sup>35</sup>

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First, the right to organize is the right to join together as a group or join a union. See Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 265 (2005) (elaborating on the right to join unions). Next, the right to bargain collectively “consists of negotiations between an employer and a group of employees so as to determine the conditions of employment.” *Collective Bargaining and Labor Arbitration: An Overview*, LEGAL INFORMATION INSTITUTE, [http://www.law.cornell.edu/wex/collective\\_bargaining](http://www.law.cornell.edu/wex/collective_bargaining) [<http://perma.cc/4BUP-AZFE>]. Last, the right to engage in strikes, picketing, and other concerted activities means that employees have the right to protest the way their employer is treating them. See NATIONAL LABOR RELATIONS BOARD, THE RIGHT TO STRIKE, <http://www.nlr.gov/strikes> [<http://perma.cc/9Z3U-3FB8>] (explaining further the right to strike).

<sup>33</sup> See MCCULLOCH & BORNSTEIN, *supra* note 30, at 13 (presenting the structure of the NLRB). See also National Labor Relations Act, Pub. L. No. 74-198, § 3, 49 Stat. 449, 451 (1935) (discussing the terms of the NLRB members). The NLRB’s terms are structured in the following manner:

One of the original members shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms to five years each, except that any individual chosen to fill a vacancy shall be appointed only of the unexpired term of the member whom he shall succeed.

*Id.*

<sup>34</sup> MCCULLOCH & BORNSTEIN, *supra* note 30, at 24. See National Labor Relations Act, Pub. L. No. 74-198, § 7, 49 Stat. 449, 452 (1935) (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.”). In addition, Section 8 governs what is an unfair labor practice. *Id.* § 8; see also John Jacob Kobus, Jr., Note, *Establishing Corporate Counsel’s Right to Sue for Retaliatory Discharge*, 29 VAL. U. L. REV. 1343, 1398 (1995) (explaining that an employer may not interfere with an employee’s rights). In the election process, the NLRB may investigate when a question affecting commerce arises, which concerns the representation of employees. National Labor Relations Act, Pub. L. No. 74-198, § 9(c), 49 Stat. 449, 453 (1935).

In addition to the NLRA establishing the national office of the NLRB, it also established twenty-one regional offices around the country. MCCULLOCH & BORNSTEIN, *supra* note 30, at 25. Regional directors and regional attorneys supervise the work of attorneys and investigators. *Id.* Today, the Board has twenty-six regional offices located in various areas around the country. NATIONAL LABOR RELATIONS BOARD, REGIONAL OFFICES, <http://www.nlr.gov/who-we-are/regional-offices> [<http://perma.cc/93PP-DRKD>]. Typically, parties will first send a complaint to the regional NLRB, and if it is not resolved in its process then the national office of the NLRB looks at it. See NATIONAL LABOR RELATIONS BOARD, INVESTIGATE CHARGES, <http://www.nlr.gov/what-we-do/investigate-charges> [<http://perma.cc/HE24-UE9B>] (outlining the process for filing charges and appealing charges).

<sup>35</sup> See HIGGINS, JR., *supra* note 32, at 30–31 (arguing that the NLRA was a “one-sided” act); see also JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 16–18 (Harvard Univ. Press 2014) (highlighting Republican disapproval of unions); *Labor Day Brings Focus to Economy*,

As a result, the Taft-Hartley Act of 1947 amended the NLRA.<sup>36</sup> The Taft-Hartley Act shifted the NLRA's focus on the rights of employees and unions to a more balanced concentration "that added restrictions on unions and also guaranteed certain freedoms of speech and conduct to employers and individual employees."<sup>37</sup> The Taft-Hartley Act changed the composition of the NLRB from three to five members.<sup>38</sup> This growth was a welcomed change since three members were not enough to keep up with the heavy workload of the NLRB.<sup>39</sup> Further, the Taft-Hartley Act

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*Declining Union Membership*, FOX NEWS (Sept. 1, 2014), <http://www.foxnews.com/politics/2014/09/01/holiday-returns-focus-to-impact-organized-labor-on-economy-declining-union/> [http://perma.cc/F7SQ-U2DM] (showing a decline in union support). Many critics strictly opposed the NLRA's favor of organized labor. ROSENFELD, *supra* note 35, at 17. Critic James MacGregor Burns wrote that the NLRA was "the most radical legislation passed during the New Deal, in the sense that it altered fundamentally the nation's politics by vesting massive economic and political power in organized labor." MCCULLOCH & BORNSTEIN, *supra* note 30, at 18 (internal quotations omitted).

<sup>36</sup> See Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (displaying the contents of the Taft-Hartley Act). See also HIGGINS, JR., *supra* note 32, at 34, 36 (presenting the need for an amendment to the NLRA). The problem areas were:

(1) the secondary boycott, which had proved to be a potent tool in the hands of some unions, injuring not only the immediate parties to the labor dispute, but disinterested third parties as well; (2) closed- and union-shop agreements, which in many instances had led to abuse and certainly contributed to labor's political and economic strength; (3) strikes and picketing, which had often turned into violence when unions were unable to achieve their goals by peaceful means; (4) corruption, which had appeared in some unions, although it was not as conspicuous during the 1940s as it later became during the 1957 McClellan Senate Committee on Improper Activities in Labor-Management Relations investigation; and (5) frequent jurisdictional disputes between unions in the construction industry, which had halted many large projects for long periods as unions bickered about the rights of different employees to various job assignments.

*Id.* at 38.

<sup>37</sup> HIGGINS, JR., *supra* note 32, at 41. The Taft-Hartley Act amended Section 1 to be directed equally at labor unions by stating that "[c]ertain practices by some labor organizations . . . have the intent or the necessary effect of burdening or obstructing commerce . . . through strikes . . . or concerted activities . . . . The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." *Id.* The Taft-Hartley Act also amended Section 7 of the NLRA by adding a provision, which gave employees the right to refrain from joining a labor organization. *Id.* at 42.

<sup>38</sup> See *id.* at 42 (establishing the change in the NLRB from a three-member board to a five-member board).

<sup>39</sup> See MCCULLOCH & BORNSTEIN, *supra* note 30, at 45 (expanding the NLRB from three to five members). "Given the Board's heavy work load, this was not a controversial amendment." *Id.* The statistics reveal that the NLRB handled on average 8700 cases per year until the Taft-Hartley Amendment. See National Labor Relations Board, *Twelfth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1947*, UNITED STATES PRINTING OFFICE 1, 83 (1947) (displaying a chart with the number of cases the NLRB handles each year). See also *infra* Part II.B (explaining all of the NLRB's duties).



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required at least a three-member quorum for decisions, which became a hurdle for the NLRB.<sup>40</sup>

The last amendment to the NLRA was the Landrum-Griffin Act of 1959, which was a response to the abuse of union power, even though it actually made very few changes to the NLRA.<sup>41</sup> Since the Landrum-Griffin Act, there have been no other major changes to the NLRB or its enabling statute.<sup>42</sup> Today, the NLRB consists of up to five members who perform a variety of functions, including: conducting elections, investigating charges, facilitating settlements, enforcing orders, and deciding cases.<sup>43</sup> These duties are split between regional offices and the

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<sup>40</sup> See Di Vito, *supra* note 21, at 314–15 (stating that the NLRB can delegate its authority). The new portion of Section 3(b) states:

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

*Id.* at 315. See also *infra* Part II.B–C (addressing the quorum requirement of the NLRB).

<sup>41</sup> See Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (amending the NLRA to create a fairer agreement for both employees and employers). See also MCCULLOCH & BORNSTEIN, *supra* note 30, at 65 (explaining how the Landrum-Griffin Act amended the NLRA). It specifically amended seven portions of the Taft-Hartley Act. See *id.* at 65–69 (outlining all seven areas of the amendment). First, the Landrum-Griffin Act closed the loop-holes in secondary boycotts by adding a prohibition against hot-cargo agreements to Section 8. *Id.* at 65–66. Next, it regulated organization and recognition picketing by creating a new unfair labor practice prohibition against unions. *Id.* at 66. Then, it adjusted the pre-hire requirements by making an exception for the construction industry. *Id.* It also allowed economic strikers, strike replacements, and non-strikers to vote in elections. *Id.* at 66–67. It permitted the Board to delegate functions to the regional boards. MCCULLOCH & BORNSTEIN, *supra* note 30, at 67–68. Last, the Landrum-Griffin Act repealed the non-communist affidavit provisions and provided that state courts and agencies could regulate the interstate labor disputes. *Id.* at 68. Overall, “the new legislation made only relatively minor changes in the fundamental structure of the federal labor laws erected by the [NLRA].” *Id.* at 69.

<sup>42</sup> See 29 U.S.C. § 153 (2012) (enabling the NLRB to act as an independent agency).

<sup>43</sup> See STANLEY R. STRAUSS & JOHN E. HIGGINS, JR., PRACTICE AND PROCEDURE BEFORE THE NATIONAL LABOR RELATIONS BOARD 1–3 (5th ed. 1996) (establishing the responsibilities of the NLRB). The NLRB’s major responsibilities include “the investigation, processing, and resolution of unfair labor practice charges and the determination of which labor organizations, if any, should represent employees in collective bargaining matters.” *Id.* at 1. See also WHAT WE DO, *supra* note 3 (explaining all the functions of the NLRB). In order to unionize, an employee must show that at least thirty percent of employees at the workplace are interested in joining a union and then notify the NLRB. NATIONAL LABOR RELATIONS BOARD, CONDUCT ELECTIONS, <http://www.nlr.gov/what-we-do/conduct-elections> [<http://perma.cc/89WC-HY64>]. In addition, the NLRB investigates any charges filed in regard to a violation of NLRA rights. See INVESTIGATE CHARGES, *supra* note 34 (explaining the process that the NLRB follows to investigate charges). These charges can resolve

national board.<sup>44</sup> The purpose of the regional and national offices is to uphold the NLRA by ensuring the rights of employees, employers, and unions.<sup>45</sup>

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settlements or result in a decision from an ALJ if a settlement cannot be reached. WHAT WE DO, *supra* note 3. Last, if the parties do not voluntarily uphold the order the NLRB has issued, it must seek enforcement from the Court of Appeals. NATIONAL LABOR RELATIONS BOARD, ENFORCE ORDERS, <http://www.nlr.gov/what-we-do/enforce-orders> [<http://perma.cc/CT55-DGU7>].

<sup>44</sup> See MCCULLOCH & BORNSTEIN, *supra* note 30, at 79–81 (dividing the duties of the NLRB between the national and regional offices). The regional boards initiate and investigate all the cases that the NLRB handles. *Id.* at 81. The regional boards also conduct all the union elections. *Id.* This Note will only focus on the national duties of the NLRB.

<sup>45</sup> See WHAT WE DO, *supra* note 3 (establishing all the NLRB's duties and its purpose); see also National Labor Relations Act, Pub. L. No. 74-198, pmb., 49 Stat. 449, 449 (1935) (showing the purpose of the NLRA). The NLRB's regional offices are analogous to the trial court level in a court system; they investigate, research and discuss each unfair labor practice case. See NATIONAL LABOR RELATIONS BOARD, UNFAIR LABOR PRACTICE PROCESS CHART, <http://www.nlr.gov/resources/nlr-process/unfair-labor-practice-process-chart> [<http://perma.cc/K6HB-6QLZ>] (displaying the process for filing an unfair labor practice charge). An unfair labor practice case arises from a violation of Section 8 of the NLRA, which governs the activities employers shall not engage in, the activities unions shall not engage in, and the activities that both are prohibited from engaging in. See 29 U.S.C. § 158 (2012) (highlighting the unfair labor practices). See also MCCULLOCH & BORNSTEIN, *supra* note 30, at 143 (listing the prohibited activities for employers and unions). Employers shall not:

[i]nterfere with, coerce, or restrain employees[;] . . . [a]ssist or dominate labor organizations[;] . . . [d]iscriminate against employees to discourage or encourage union membership, except that a lawful union security clause may be signed[;] . . . [d]iscriminate against employees because they have given testimony or filed charges with the Board[; or] . . . [r]efuse to bargain in good faith with a majority union.

*Id.* Unions shall not:

[c]oerce or restrain employees or interfere with management's choice of a bargaining agent[;] . . . [c]ause an employer to discriminate against employees illegally[;] . . . [r]efuse to bargain in good faith with an employer[;] . . . [e]ngage in secondary boycotts or jurisdictional strikes[;] . . . [c]harge excessive or discriminatory initiation fees[;] . . . [e]ngage in featherbedding[; or] . . . [e]ngage in organization or recognition picketing.

*Id.* Finally, neither a union nor employer shall "[e]nter into 'hot cargo' agreements." *Id.*

When the charge is received, an attorney is assigned to investigate the facts and conduct any interviews needed. *Id.* at 85. After investigation, the regional director receives a recommendation whether to pursue the unfair labor practice complaint. *Id.* If at the end of this process a person is not satisfied he or she can appeal the decision by petitioning the national NLRB to review the case. See MCCULLOCH & BORNSTEIN, *supra* note 30, at 85–89. (stating that it is simple to appeal to the national office of the NLRB).

In addition to investigating, deciding, settling, and enforcing orders on cases, the regional offices also facilitate representation elections. See NATIONAL LABOR RELATIONS BOARD, THE NLRB PROCESS, <http://www.nlr.gov/resources/nlr-process> [<http://perma.cc/F7UR-C5KF>] (displaying a chart which describes the process of representation elections). When a party files a petition for a representation election with the union office, it is investigated and determined. *Id.* Then, it can go through either consent

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The history of the NLRB significantly influenced how the Board operates today.<sup>46</sup> The NLRA established the NLRB, its purpose, and the duties it performs.<sup>47</sup> Although the amendments to the enabling statute helped the NLRB evolve, cases have also impacted the NLRB's organization.<sup>48</sup>

### B. *The NLRB's Organization*

The NLRB is organized into a five-member board at the national level with twenty-six regional offices.<sup>49</sup> The President either appoints members of the NLRB with Senate confirmation, or the President appoints members by using the recess appointment power.<sup>50</sup> First, Part II.B.1 discusses the NLRB's structure.<sup>51</sup> Next, Part II.B.2 explains how NLRB members are appointed.<sup>52</sup>

#### 1. How the NLRB is Structured

At the national level, each of the five board members has their own Chief Counsel and staff of attorneys.<sup>53</sup> These members help the NLRB review the records of unfair labor practice cases and write the decision of each case.<sup>54</sup> The NLRB also has a General Counsel, which supervises the

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procedures, in which parties consent to an election and waive their hearing, or other formal procedures. *Id.* If a petition goes through the formal procedures, a hearing is held, a decision is made by the regional director, and parties may request for a review of the decision. *Id.* After this process, the regional director conducts the election and if there are no objections, the director issues results. *Id.*

<sup>46</sup> See *supra* Part II.A (explaining how the NLRB was created and the changes that have been made to the Board since its creation).

<sup>47</sup> See National Labor Relations Act, Pub. L. No. 74-198, pmbl., 49 Stat. 449, 449 (1935) (showing the purpose of the NLRA).

<sup>48</sup> See *infra* Part II.C–D (elaborating on the *New Process Steel, L.P. v. NLRB* and *NLRB v. Canning* holdings and their effect on the NLRB).

<sup>49</sup> See REGIONAL OFFICES, *supra* note 34 (stating that the NLRB has twenty-six regional offices around the country). See also TANJA L. THOMPSON, GWYNNE A. WILCOX & BARRY J. KEARNEY, THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 248 (BNA Supplement 2013) (establishing that there used to be thirty-two offices). “The regional office restructuring program began with the merger of regional offices in Atlanta, Georgia . . . and Winston-Salem, North Carolina . . .” *Id.*

<sup>50</sup> See U.S. CONST. art. II, § 2, cl. 2 (presenting the presidential appointment power); see also U.S. CONST. art. II, § 2, cl. 3 (granting the President recess appointment power).

<sup>51</sup> See *infra* Part II.B.1 (discussing the structure of the NLRB).

<sup>52</sup> See *infra* Part II.B.2 (examining how members get appointed to the NLRB).

<sup>53</sup> See HIGGINS, JR., *supra* note 32, at 2826 (explaining all of the components that make up the national office of the NLRB).

<sup>54</sup> See *id.* (expanding on the role of the legal staff of the NLRB). The role of legal staff is as follows:

attorneys on the board, governs different aspects of the regional offices, and oversees the NLRB as a whole.<sup>55</sup> In addition, the NLRB's ALJs preside over unfair labor practice hearings.<sup>56</sup> Although the NLRB has many parts, this Note focuses on the five-member national board and its role in labor and employment law.<sup>57</sup>

The national level of the NLRB is analogous to a court of appeals because it investigates contested cases and elections.<sup>58</sup> Each year, the NLRB issues approximately 1400 decisions from contested cases.<sup>59</sup> In

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If the case is a simple one, clearly covered by Board precedent, the legal staff will often prepare a draft decision for approval by a three-member panel of the Board. If the decision raises arguable questions, it may be referred for further consideration to a subpanel of supervisory attorneys from staffs of the three different Board members and then to a panel of three Board members. Only cases thought to be particularly important are discussed by the full Board.

*Id.*

<sup>55</sup> See *id.* at 2827 ("General Counsel 'shall exercise general supervision over all attorneys employed by the Board . . . and over the officers and employees in the regional offices.'"). The General Counsel's authority is not reviewable by the courts. *Id.* There are four main divisions of the General Counsel: Division of Enforcement Litigation, Division of Advice, Division of Operations-Management, and Division of Administration. *Id.* at 2828. The Division of Enforcement Litigation handles all enforcement, review, and contempt litigation in the court of appeals and Supreme Court. HIGGINS, JR., *supra* note 32, at 2828. The Division of Advice gives legal advice to regional offices, the injunction litigation branch, and the policy branch. *Id.* The Division of Operations-Management coordinates the work with both the regional offices and the national office. *Id.* Last, the Division of Administration aids with administrative, fiscal, and personnel management services for both the Board and the General Counsel. *Id.* Although the General Counsel does a lot for the NLRB, it is not the focus of this Note.

<sup>56</sup> See *id.* (establishing the duties of ALJs on the NLRB). The ALJs conduct formal hearings for all of the General Counsel's complaints. *Id.* These judges function like trial court judges in non-jury hearings because they perform many of the same duties. See HIGGINS, JR., *supra* note 32, at 2829 (comparing ALJs in NLRB proceedings to trial court judges). The decisions of the ALJs are final unless the parties appeal. *Id.*

<sup>57</sup> See *infra* Part III (analyzing the national office and structure of the NLRB).

<sup>58</sup> See MCCULLOCH & BORNSTEIN, *supra* note 30, at 82 (explaining the process the national office uses to review cases). See also STRAUSS & HIGGINS, *supra* note 43, at 85–105 (detailing the intricate, trial-like process for appealing a regional board decision). After the regional board issues a complaint, an ALJ presides over the case at a hearing. *Id.* at 94–99. At the close of the hearing and submission of the briefs, the judge issues a decision containing findings of fact, conclusions, and the reasons or basis of its decision. *Id.* at 99. After the decision is issued, if a party wants a reconsideration or rehearing of the case, he or she must file a motion within twenty-eight days of the issuance of the decision. *Id.* at 103. The motion must state the error in the decision and it is looked over by a panel of NLRB members. *Id.*

<sup>59</sup> MCCULLOCH & BORNSTEIN, *supra* note 30, at 82. An unfair labor practice case starts with an aggrieved employee filing a charge that an employer or labor organization committed an unfair labor practice. *Id.* at 85. Any person can file a charge with the NLRB even if they do not have an interest in the outcome of the case. *Id.* When the regional office receives the charge, an attorney investigates the facts, which sometimes involves an interview of the aggrieved party or witnesses. *Id.* The attorney then recommends to the regional director

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order to review a case or contested election, the NLRB examines the record that the regional office and the ALJ created.<sup>60</sup> After reviewing the record, the NLRB rules on the issue, which requires at least three votes to be valid.<sup>61</sup>

Any party who is not satisfied with the ruling of the NLRB can appeal to the federal court of appeals.<sup>62</sup> The federal court system typically upholds the decisions of the NLRB and may give deference to the Board because of its expertise in labor and employment law.<sup>63</sup> Critics maintain that one problem when appealing to a federal court is that the NLRB's order is put on hold during an appeal, which means employees remain in limbo while their case is decided.<sup>64</sup> Scholars have also argued that this

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that the complaint either be charged or dismissed. *Id.* A majority of cases are settled once a complaint is issued, but the cases that are not settled are scheduled for a formal hearing. *Id.* at 86. The General Counsel of the regional office represents the employee and has the burden of proof. MCCULLOCH & BORNSTEIN, *supra* note 30, at 87. The other party then attempts to prove its defense. *Id.* At the end of the hearing, the parties are entitled to file briefs for the ALJ to review. *Id.* After the ALJ decides, he or she writes a formal Decision and Recommendations, which "summarizes the issues, states the facts as the judge finds them, discusses applicable provisions of the statute and precedents, and then determines that the Act has or has not been violated." *Id.* at 89.

<sup>60</sup> See *supra* notes 45, 59 and accompanying text (explaining the regional and ALJ review process). "When a case reaches the Board on appeal from an [ALJ]'s decision, the executive secretary assigns it to one Board member, who, in turn, assigns it to a legal assistant for primary research and analysis." MCCULLOCH & BORNSTEIN, *supra* note 30, at 90. Most cases are decided by a subpanel of experienced representatives of the three board members assigned to the case. *Id.* The three board members review the tentative disposition that the experienced representatives made before it becomes final. *Id.* These decisions are then circulated to all nonparticipating board members for extra safeguarding. *Id.* If a case is difficult or controversial, the full board reviews it during a weekly meeting of all of the NLRB members. *Id.*

<sup>61</sup> See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 688 (2010) (stating that the NLRB needs three members to have a valid quorum); see also *infra* Part II.C (showing the facts and reasoning of *New Process Steel, L.P. v. NLRB*).

<sup>62</sup> See MCCULLOCH & BORNSTEIN, *supra* note 30, at 116 ("Any party who has been aggrieved by an unfair labor practice decision of the Board may appeal to the federal circuit courts of appeals."). Because the NLRB's orders are not self-enforcing, more than half of unfair labor practice decisions are either appealed to the court of appeals or are taken to the courts by the board to seek enforcement. *Id.* The process of appealing to a federal court is also very expensive and can cost on average \$15,000 for plaintiffs and \$20,000 for defendants. Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 770 (2010).

<sup>63</sup> See MCCULLOCH & BORNSTEIN, *supra* note 30, at 116-17 (stating that approximately eighty-five percent of all cases from the NLRB that are appealed to the court of appeals are upheld); see also Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995, 1022 (2005) (stating that the federal courts are not experts in labor law).

<sup>64</sup> See MCCULLOCH & BORNSTEIN, *supra* note 30, at 118 ("[A]n employee who has been discharged illegally, for example, must wait for an additional year *after* the Board's decision in his favor before he is entitled to reinstatement of his former job and to back pay."). This timeline could greatly inconvenience and even harm employees who have not been able to

judicial review process interferes with the NLRB's ability to do its job and overburdens the courts.<sup>65</sup> Overall, the federal courts of appeals helps to keep the board from making improper decisions.<sup>66</sup> In order to maintain this structure, members must be appointed to the NLRB.<sup>67</sup>

## 2. Appointing Members to the NLRB

The President appoints each of the five members on the NLRB for a term of five years.<sup>68</sup> The presidential appointment process has two steps.<sup>69</sup> First, the President must nominate a member whom he or she believes is qualified to be on the NLRB.<sup>70</sup> Then, the Senate must confirm the President's nomination by a supermajority, which consists of a three-fifths vote or sixty senators.<sup>71</sup> Recently, the Senate invoked the "nuclear

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find other jobs. *Id.* In addition, this process could deter parties from asking for a review of their case if they need what little back pay they can get now. *Id.* This practice not only delays a party from finding a remedy, but also decreases the overall administration of the NLRA. *Id.*

<sup>65</sup> See *id.* at 116 (arguing that some people believe the judicial review process should not be afforded to all parties because it slows down the process and burdens the federal court system); see also *Introduction: Reform in the Federal Court System*, 54 U. PITT. L. REV. 685, 685 (1993) (stating that the federal courts are overburdened and due for a reform).

<sup>66</sup> See MCCULLOCH & BORNSTEIN, *supra* note 30, at 116 (explaining the judicial review process). In addition to parties being able to appeal to the federal court, the NLRB also has to present its orders to the appellate level court in order for them to be enforced. *Id.* "As a practical matter this means that each year approximately 350 to 400 new NLRB cases end up in the courts of appeals." *Id.* Based on other agencies, the NLRB decides more cases which are subject to judicial review than any other agency. *Id.*

<sup>67</sup> See *infra* Part II.B.2 (demonstrating how members are appointed to the NLRB).

<sup>68</sup> See 29 U.S.C. § 153 (2012) (displaying the policies for nomination to the NLRB). If a member is chosen to fill a vacancy on the Board, his or her term shall last until the end of the term of the person who created the vacancy. *Id.* § 153(a). See also MCCULLOCH & BORNSTEIN, *supra* note 30, at 107 (establishing the confirmation process of NLRB members). This appointment power does not give full power to the President or to the Senate because both have to agree on a nomination. See John C. Roberts, *The Struggle Over Executive Appointments*, 2014 UTAH L. REV. 725, 726 (2014) (arguing that the appointment power is split by the branches of government). Throughout history the Senate obstructed presidential nominees to agencies by filibustering or simply not deciding an appointment. *Id.* at 732. On the other hand, recess appointment power gives the President the ability to overcome any tactics the Senate uses to stop the appointment. *Id.* This change greatly increased the President's power. *Id.* at 735.

<sup>69</sup> See MCCULLOCH & BORNSTEIN, *supra* note 30, at 113 (discussing the two step confirmation process). Although some appointments have been "political," both the management and the labor side are informally contacted by the Secretary of Labor prior to an appointment being announced. *Id.*

<sup>70</sup> See *id.* (elaborating on presidential appointments); see also MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 273-80 (2000) (considering whether the Senate can condition a President's choice of nomination by mandating certain qualifications).

<sup>71</sup> See U.S. CONST. art. II, § 2, cl. 2 (giving appointment power to the President). This section states:

option[.]” which changed the number of votes needed to confirm an appointment from three-fifths to a majority.<sup>72</sup> Although the nuclear option can make it easier for appointments to be confirmed, there are roadblocks, such as political gridlock and Senate inaction, which make presidential nominations more difficult.<sup>73</sup>

The other method of appointing members to the NLRB is through recess appointment power.<sup>74</sup> During the period of time from the NLRB’s creation in 1935 until the 1980s, the Senate confirmed the presidential nominations to the NLRB and recess appointments were never utilized.<sup>75</sup> After Ronald Reagan’s presidency, the Senate began to obstruct NLRB appointments by delaying or voting against them.<sup>76</sup> This change in appointments led Presidents to invoke their recess appointment power from the Constitution in order to bypass Senate confirmation.<sup>77</sup> This

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He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for . . .

*Id.* See also Orrin G. Hatch, *How 52 Senators Made 60=51*, 25 STAN. L. & POL’Y REV. ONLINE 9, 12 (2014), [https://journals.law.stanford.edu/sites/default/files/stanford-law-policy-review/online/hatch\\_25\\_stan\\_l\\_poly\\_rev\\_online\\_9.pdf](https://journals.law.stanford.edu/sites/default/files/stanford-law-policy-review/online/hatch_25_stan_l_poly_rev_online_9.pdf) [http://perma.cc/SFE9-PY47] (stating that prior to the nuclear option, a three-fifths vote was required for appointment).

<sup>72</sup> See Hatch, *supra* note 71, at 12 (explaining how the “nuclear option” works); see also Millhisser, *Nuclear Option*, *supra* note 14 (detailing the nuclear option); Z. Byron Wolf, *What’s the Nuclear Option?*, CNN POLITICS (Nov. 21, 2013), <http://www.cnn.com/2013/11/21/politics/nuclear-option-explainer/> [http://perma.cc/Z5Y7-UWHP] (describing the nuclear option). The nuclear option was a big change because for the five preceding years the Senate blocked confirmation of appointments by filibustering. See Millhisser, *Nuclear Option*, *supra* note 14 (noting the state of appointments prior to the nuclear option).

<sup>73</sup> See *infra* Part II.B.2 (commenting how important party alignment is to presidential appointment power).

<sup>74</sup> See U.S. CONST. art. II, § 2, cl. 3 (illustrating the President’s recess appointment power). The clause states that “[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” *Id.* Many scholars analyzed the Recess Appointments Clause and “argued that the Appointments Clause is inherently political and must be approached with its principal purpose in mind—to ensure the smooth and sustained functioning of the national government in all its vast and varied fields of responsibility.” Roberts, *supra* note 68, at 732.

<sup>75</sup> See MCCULLOCH & BORNSTEIN, *supra* note 30, at 107 (“[T]he Senate rarely exercises its power to challenge the President’s choices for membership on *any* of the federal regulatory agencies.”); see also Roberts, *supra* note 68, at 732 (stating that after the 1980s the Senate began to challenge the President’s nominations to administrative agencies).

<sup>76</sup> Roberts, *supra* note 68, at 732. “In a number of cases, minority obstruction was based not on doubts about the qualifications or sustainability of the nominee, but on a desire to cripple the officer or agency involved.” *Id.* at 736.

<sup>77</sup> See U.S. CONST. art. II, § 2, cl. 3 (establishing recess appointment power). “[F]ive of the

power allows a President to appoint a member to an agency – which the Senate was either delaying or would likely not confirm – during a break in Senate activity.<sup>78</sup> As a result, Presidents have used the recess appointment power 652 times since President Reagan's administration.<sup>79</sup>

Recess appointment power is most important when the NLRB's membership declines and the Senate does not agree on the new member the President nominates for appointment.<sup>80</sup> In fact, more than fifty percent of recess appointments in the past ten years occurred when the Board was

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last seven appointments to the NLRB have been recess appointments, as presidents were unable to achieve Senate confirmation of their choices." Roberts, *supra* note 68, at 737. Around the same time, Senator Richard Shelby stopped all White House nominations for executive positions when over seventy nominations were pending. THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 85 (2012).

<sup>78</sup> See David Frisof, Note, *Plausible Absurdities and Practical Formalities: The Recess Appointments Clause in Theory and Practice*, 112 MICH. L. REV. 627, 631 (2014) (asserting that the President may use recess appointments to appoint members whose terms will end at the end of the next session). The goal of recess appointments is to ensure that government offices are able to continue functioning without any interruptions. Roberts, *supra* note 68, at 744. Critics have taken issue with the ambiguous language in the recess appointment power, which is why it is so controversial. *Id.* at 745.

<sup>79</sup> Henry Hogue et al., Cong. Research Serv., *The Noel Canning Decision and Recess Appointments Made from 1981–2013*, at 4 tbl. 1 (2013), <http://www.fas.org/sgp/crs/misc/m020413.pdf> [<http://perma.cc/G9AQ-PHBE>]. When using recess appointment power, Presidents typically appoint members belonging to their same political party to the NLRB. Compare Hogue et al., *supra* note 79, at 5–29 tbl. 2–11 (showing the recess appointments each president made), and Prints and Photographs Division, *Chronological List of Presidents, First Ladies, and Vice Presidents of the United States*, LIBRARY OF CONGRESS, WASHINGTON, D.C., [http://www.loc.gov/rr/print/list/057\\_chron.html](http://www.loc.gov/rr/print/list/057_chron.html) [<http://perma.cc/X7LG-4Y8Z>] (providing a list of the presidents and what years they served), with MEMBERS OF THE NLRB SINCE 1935, *supra* note 11 (displaying the political party affiliation of members of the NLRB). For example, President Reagan's recess appointments included five Republican members and one Democrat member while President Obama's recess appointments included four Democrat members and one Republican member. Compare Hogue et al., *supra* note 79, at 5–12, 27–28 tbl. 2, 3, 10 (reporting President Reagan's recess appointments), with MEMBERS OF THE NLRB SINCE 1935, *supra* note 11 (reviewing the political party affiliation of NLRB members). No matter which side a particular President favors, the general consensus regarding partisanship appointment prevents the appointment of a majority of either union supporters or management supporters. See Roberts, *supra* note 68, at 737 (explaining the reasons for appointing a member of one's own political party).

<sup>80</sup> See Roberts, *supra* note 68, at 737 (noting when the recess appointment power is most important). For example, President Obama had to use the recess appointment power to pursue his administration's labor policies and carry out his statutory abilities when the NLRB was down to two members for two years prior to his first term of office. *Id.* See also Richard D. Kahlenberg & Moshe Z. Marvit, "Architects of Democracy": Labor Organizing as a Civil Right, 9 STAN. J. C.R. & C.L. 213, 225–26 (2013) (arguing that the NLRB's structure and process place it in a vulnerable position to be a target for opponents of workers' rights).



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on the verge of falling below the necessary three-member quorum.<sup>81</sup> Overall, this power is most often used to maintain the needed quorum.<sup>82</sup>

C. *The Quorum Requirement of the NLRB*

The NLRB has the power to delegate the authority of deciding cases to a certain group of members on the Board.<sup>83</sup> In 2007, the NLRB used its own interpretation of this delegation power to its advantage.<sup>84</sup> At that time, the NLRB only had four members and the terms of two of the members were set to expire, which would cause the NLRB to fall below the three-member quorum requirement.<sup>85</sup> In order to solve the quorum problem, the NLRB delegated its authority to three members.<sup>86</sup> The NLRB reasoned that when the Board was left with two members, there could be a quorum because these two members would be a majority of the delegated three members—of which only two still remained on the

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<sup>81</sup> See MEMBERS OF THE NLRB SINCE 1935, *supra* note 11 (analyzing the members appointed to the Board by a recess appointment). In the NLRB's history, Presidents have appointed twenty-two members using the recess appointment power—seven of which have been in the past ten years. See *id.* (displaying all of the members on the NLRB and how they were appointed).

<sup>82</sup> See *id.* (identifying the number of times the NLRB's membership has fallen to two or three members and the number of members who have been recess appointed).

<sup>83</sup> See 29 U.S.C. § 153(b) (2012) (giving the NLRB the power to delegate authority). This part of the enabling statute states:

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

*Id.*

<sup>84</sup> See Keith et al., *supra* note 8 (stating that the NLRB used its delegating authority). The NLRB used its delegation power to get around the three member quorum requirement by delegating authority to three members and requiring two of those members to vote in favor for a majority. See 29 U.S.C. § 153(b) (establishing the NLRB's delegation power).

<sup>85</sup> See Keith et al., *supra* note 8 (explaining why the NLRB delegated its authority).

<sup>86</sup> See Matthew D. Moderson, Comment, *The National Labor Relations Board After New Process Steel: The Case for Amending Quorum Requirements Under the National Labor Relations Act*, 80 UMKC L. REV. 463, 470 (2011) (commenting on the delegation of authority to three members).

Board.<sup>87</sup> Many parties began to challenge the NLRB's decisions because its enabling statute specified that three members constituted a quorum of the five-member board.<sup>88</sup> It was not until *New Process Steel, L.P. v. NLRB* that these decisions were invalidated.<sup>89</sup>

In *New Process Steel*, the NLRB issued two decisions sustaining unfair labor practice charges against New Process Steel with a two-member board.<sup>90</sup> New Process Steel challenged the decision and argued that the NLRB did not have enough members to constitute a quorum and that the delegation of authority was invalid.<sup>91</sup> The Court held that these two members did not constitute a quorum because they were not a majority of a delegated group, but *the only two members* of the group.<sup>92</sup>

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<sup>87</sup> See *id.* (displaying the reasoning for delegating authority). Moderson states: Collectively, the Board recognized that a two-member board might not satisfy the quorum requirements set forth under Section 3(b) of the National Labor Relations Act and thus would lack the authority to adjudicate labor disputes until the President appointed a replacement Board member. The Board suggested that such a delay would create tremendous headaches for employers and unions seeking to resolve disputes.

*Id.* The NLRB relied on the statutory language of Section 3(b) of its enabling act and an opinion issued by the Office of Legal Counsel. *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 677 (2010). The NLRB went on to decide 600 cases with just those two members. Keith et al., *supra* note 8.

<sup>88</sup> See 29 U.S.C. § 153(a) (2012) (displaying the NLRB's enabling statute).

<sup>89</sup> 560 U.S. at 688. It is important to note that before this decline in membership, the NLRB had never lost its quorum for more than two months. See MEMBERS OF THE NLRB SINCE 1935, *supra* note 11 (showing that the membership had not declined to less than three members for more than a month until the time of *New Process Steel*).

<sup>90</sup> *New Process Steel*, 560 U.S. at 678. Other employers made the same challenge that New Process Steel did and some circuits held differently in those cases. See, e.g., *Narricot Indus., L.P. v. NLRB*, 587 F.3d 654, 660 (4th Cir. 2009) (articulating that a two-member board was empowered to issue decisions); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410, 410, 424 (2d Cir. 2009) (deciding that the delegation was not against the NLRB's enabling statute); *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 470, 476 (D.C. Cir. 2009) (ruling that two members did not constitute a valid quorum in order to decide cases); *Ne Land Servs., Ltd. v. NLRB*, 560 F.3d 36, 40–41 (1st Cir. 2009) (holding that the NLRB's delegation to a panel of two members was lawful under the plain text of the NLRA).

<sup>91</sup> *New Process Steel*, 560 U.S. at 678. The Seventh Circuit decided in favor of the NLRB because they reasoned that “the Taft-Hartley Amendment—which increased the Board's membership from three to five members—was to allow the Board to hear more cases” and therefore, a court should not make an interpretation that was opposite of this. Di Vito, *supra* note 21, at 317.

<sup>92</sup> *New Process Steel*, 560 U.S. at 687. First, the Court stated that it was undisputed that the NLRB could delegate its power to a three-member group. *Id.* at 680. The Court then interpreted the language of the NLRB's enabling statute in order to decide whether two of the three delegated members constituted a quorum. *Id.* at 680–82. The Court reasoned that if Congress wanted two members to constitute a quorum, it would have put a provision in the enabling statute. *Id.* at 680–83. In addition, the NLRB's practice has been to require three members to decide cases. *Id.* at 683.

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*New Process Steel* caused much panic in the labor world and created extra work for the NLRB.<sup>93</sup> As a result of *New Process Steel*, around 600 cases could be appealed.<sup>94</sup> In an attempt to remedy this, the NLRB issued a press release that stated all administrative decisions were valid; this included decisions to add members and ALJs to regional boards.<sup>95</sup> Even though the press release shielded many cases, the NLRB was still left with about 100 cases that could be appealed.<sup>96</sup>

## D. NLRB v. Canning

After *New Process Steel*, the next time the NLRB fell to two members, President Obama used his recess appointment power to appoint three members to the NLRB: Sharon Block, Richard Griffin, and Terrence Flynn.<sup>97</sup> President Obama made these recess appointments because the nominations were pending in the Senate, no action was taken, and the

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<sup>93</sup> See Di Vito, *supra* note 21, at 329 (noting that this decision affected many cases and it solidified the formalistic approach of the Supreme Court). The decision not only affected cases decided by the NLRB, but also other courts. *Id.* Four other circuit courts of appeals decided this issue and came to the opposite conclusion, thus, the Supreme Court overturned their rulings. *Id.*

<sup>94</sup> See *id.* at 329 (stating that almost 600 cases the NLRB decided will be overturned). *New Process Steel* will have a greater effect on precedent when administrative agency action is interpreted in the future. *Id.* Courts may use this as a model and interpret a statute very formally which could take away certain powers from administrative agencies. *Id.*

<sup>95</sup> See Office of Public Affairs, *New Board Ratifies the General Counsel's Litigation Authority in 2008-09. Also Ratifies Administrative and Personnel Actions From that Period*, NATIONAL LABOR RELATIONS BOARD (July 8, 2010), <http://mynlrb.nlr.gov/link/document.aspx/09031d4580380dec> [<http://perma.cc/QY2-4W49>] (determining that all administrative and personnel decisions are unilaterally ratified). In addition, the press release stated that the general counsel decisions were not affected. *Id.* See also Office of Public Affairs, *NLRB Outlines Plans for Considering 2-Member Cases in Wake of Supreme Court Ruling*, NATIONAL LABOR RELATIONS BOARD (July 1, 2010), <http://mynlrb.nlr.gov/link/document.aspx/09031d458037e114> [<http://perma.cc/5QC5-M88H>] (explaining how the NLRB will handle the appealed cases).

<sup>96</sup> See Susan J. McGolrick, *Board Seeking Remand of About 96 Cases Challenging Validity of Two-Member Rulings*, 79 U.S.L.W. 1000, 1030 (2010) (stating that each remanded case will be considered by a three member panel). The NLRB reviewed some of those decisions, which took away time from its current operations, but most of the case decisions stayed the same. See Amanda Becker, *U.S. Supreme Court Ruling Seen Unlikely to Alter Past NLRB Decisions*, THOMSON REUTERS (June 26, 2014), <http://www.reuters.com/article/2014/06/26/us-usa-courts-appointments-nlr-idUSKBN0F12J820140626> [<http://perma.cc/MLP8-YX2F>] ("In most cases, the new decisions and old decisions were the same, but that wasn't the case in every single case . . .").

<sup>97</sup> See *NLRB v. Canning*, 134 S. Ct. 2550, 2557 (2014) (displaying the facts, which led up to the *Canning* dispute).

NLRB was about to lose its quorum.<sup>98</sup> At the time President Obama made these appointments, the Senate was only meeting for *pro forma* sessions.<sup>99</sup>

*Noel Canning* was one of the many decisions decided by the NLRB with the three members President Obama appointed during the Senate's *pro forma* session in 2013.<sup>100</sup> The NLRB did not find in favor of Noel Canning and ordered them to make their employees whole for any losses.<sup>101</sup> Noel Canning requested that the Court of Appeals and the District of Columbia Circuit Court set their orders aside, claiming that three of the current NLRB members were invalidly appointed.<sup>102</sup>

The issue in this case was whether the January 3–6 *pro forma* sessions the Senate held were enough to consider the Senate to be in session.<sup>103</sup> The Supreme Court analyzed the language of the Recess Appointments Clause, and a nine Justice plurality concluded President Obama's recess

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<sup>98</sup> See 159 CONG. REC. S16 (daily ed. Jan. 3, 2013) (Nominations Returned to the President) (showing that Senate members were not confirming nominations to the NLRB).

<sup>99</sup> *Canning*, 134 S. Ct. at 2557. See THOMPSON ET AL., *supra* note 49, at 246 (discussing the actions taken by President Obama which led up to the *NLRB v. Canning* dispute). *Pro forma* sessions are brief meetings of the Senate; sometimes only lasting a few minutes. UNITED STATES SENATE, [https://www.senate.gov/reference/glossary\\_term/pro\\_forma\\_session.htm](https://www.senate.gov/reference/glossary_term/pro_forma_session.htm) [<https://perma.cc/3UX6-VA5D>]. The NLRB then went on to make approximately 800 decisions with these members. See Lawrence E. Dubé, *Justices Reject NLRB Recess Appointments and Mark Constraints on Presidential Power*, BNA: DAILY LABOR REPORT (June 27, 2014), <http://www.bna.com/justices-reject-nlr-b-n17179891622/> [<http://perma.cc/XQQ5-4F5N>] (stating that the invalidated Board decided about 300 unpublished decisions and 500 published decisions).

<sup>100</sup> See *Noel Canning*, 358 N.L.R.B. No. 4 (Feb. 8, 2012) (articulating that the NLRB did not find in favor of Noel Canning). The NLRB "found that a Pepsi-Cola distributor, Noel Canning, had unlawfully refused to reduce to writing and execute a collective-bargaining agreement with a labor union." *Canning*, 134 S. Ct. at 2557.

<sup>101</sup> *Canning*, 134 S. Ct. at 2557. The court also ordered Noel Canning to execute a collective-bargaining agreement with its employees. *Id.*

<sup>102</sup> *Id.* Noel Canning's view was that the Senate meeting on January 3, 2013, terminated the recess of the Senate. *Id.* The Court of Appeals ruled that almost all recess appointments were invalid. See *Canning v. NLRB*, 705 F.3d 490, 515 (D.C. Cir. 2013) (holding that Obama's recess appointments were invalid). The Court of Appeals said that the recess appointment must be made within the same intersession recess when the vacancy for that office arose. *Id.* at 514.

<sup>103</sup> See UNITED STATES SENATE, *supra* note 99 (defining a *pro forma* session as a brief meeting of the Senate). At some of these sessions the Senate would only bang the gavel and then adjourn. See Jennifer Steinhauer, *Sometimes a Day in Congress Takes Seconds, Gavel to Gavel*, N.Y. TIMES (Aug. 5, 2011), <http://www.nytimes.com/2011/08/06/us/politics/06congress.html> [<http://perma.cc/364B-LHZH>] (stating that a meeting of the Senate lasted fifty-nine seconds). Critics argue that these *pro forma* sessions were scheduled for the purpose of preventing President Obama from recess appointing members. See Alexander Bolton, *Senate Schedules Pro-forma Sessions to Block Obama's Appointments*, THE HILL (Dec. 12, 2011), <http://thehill.com/homenews/senate/200121-senate-schedules-pro-forma-sessions-to-block-obamas-recess-appointments> [<http://perma.cc/AA9K-BH4N>] (criticizing that the Senate was only trying to block appointments and was not conducting any business).

appointments were invalid.<sup>104</sup> However, the Court's reasoning was much broader than that of the Court of Appeals.<sup>105</sup> The Court determined that the length of recess was the most relevant factor in whether the Recess Appointments Clause was activated.<sup>106</sup> Finally, the Court stated that the Senate decides when it is in session as long as it has the capacity to act.<sup>107</sup>

Some scholars and critics observed this opinion to be a "[c]onstitutional [c]risis" because it "unanimously limited the president's power to make temporary recess appointments when the Senate is not in session."<sup>108</sup> However, there is also an argument that the Court could have limited the recess appointment power more than it chose to.<sup>109</sup> In addition, those who were in favor of the Senate thought the regulation was much needed.<sup>110</sup>

<sup>104</sup> See *Canning*, 134 S. Ct. at 2578 (concluding that the Senate needed to have a recess for at least ten days in order for the recess appointments to be valid).

<sup>105</sup> See *id.* at 2567 (upholding recess appointment power, but limiting its use by various requirements); Charlie Savage, *Between the Lines of the Recess Appointments Decision*, N.Y. TIMES (June 26, 2014), <http://www.nytimes.com/interactive/2014/06/25/us/annotated-supreme-court-recess-decision.html> [<http://perma.cc/D5J5-DFEA>] ("While on the surface the ruling was a blow to executive power, on a deeper level it was also a victory for executive power because it rolled back an appeals court ruling that had gone much further in restricting such authority.").

<sup>106</sup> See *Canning*, 134 S. Ct. at 2567 ("If a Senate recess is so short that it does not require the consent of the House, it is too short to trigger the Recess Appointments Clause . . . [a]nd a recess lasting less than 10 days is presumptively too short as well."). In addition, the Supreme Court interpreted the language "all vacancies" in the Recess Appointments Clause to include both vacancies that occur during a recess of the Senate and those that occur while the Senate is in session. *Id.* at 2573. By broadly interpreting the Recess Appointments Clause, the Court chose not to distinguish between intersession recess appointments and intrasession recess appointments because they stated that "the recess" applied to both. *Id.* at 2567.

<sup>107</sup> See *id.* at 2574 (leading to the conclusion that the *pro forma* sessions signified the Senate being in session). In addition to the majority opinion, Justice Scalia wrote a concurring opinion in which he argued that the Recess Appointments Clause only applied to breaks in between sessions. *Id.* at 2595 (Scalia, J., concurring). He also argued that the Recess Appointments Clause only applied to vacancies, which happen while the Senate is in recess. *Id.* at 2617. All in all, Scalia stated that the majority "replaces the Constitution's text with a new set of judge-made rules to govern recess appointments." *Canning*, 134 S. Ct. at 2617.

<sup>108</sup> Pema Levy, *Did the Supreme Court Just Set Up a Constitutional Crisis?*, NEWSWEEK (June 27, 2014), <http://www.newsweek.com/did-supreme-court-just-set-constitutional-crisis-256461> [<http://perma.cc/TX9J-A9U8>]. If the President does not control both houses of Congress he might not be able to make appointments. *Id.* See also Jeff Shesol, *Did History Win in Noel Canning*, THE NEW YORKER (June 26, 2014), <http://www.newyorker.com/online/blogs/newsdesk/2014/06/supreme-court-recess-appointments-power-noel-canning.html> [<http://perma.cc/PW9K-ECF6>] (arguing that this provision gives the Senate the power to avoid confirming presidential appointments indefinitely).

<sup>109</sup> See Savage, *supra* note 105 (stating that the Supreme Court "rolled back" on how far the Court of Appeals had gone).

<sup>110</sup> See, e.g., Carrie Johnson, *Court Ruling Upsets Conventional Wisdom On Recess*

Many critics also realized that this decision could invalidate an abundance of cases.<sup>111</sup> Some critics argued that every case needed to be reanalyzed, while others argued that it is likely the NLRB will rubber stamp them resulting in no major policy changes.<sup>112</sup> Regardless of the side the critics supported, everyone maintained that the decision created a lot of work for the NLRB because the agency would need to reanalyze cases and make up for the time when the Board did not have a quorum.<sup>113</sup>

#### E. *The Aftermath of NLRB v. Canning*

After the invalidation of President Obama's recess appointments, the Court required those members to vacate the Board.<sup>114</sup> This decision left three open positions on the NLRB.<sup>115</sup> On July 30, 2013, the Senate confirmed a new board that included two old members and three new members.<sup>116</sup> Each of these members have varying experiences and

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*Appointments*, NPR (Jan. 25, 2013), <http://www.npr.org/blogs/itsallpolitics/2013/01/25/170293179/court-ruling-upsets-conventional-wisdom-on-recess-appointments> [<http://perma.cc/VNL6-Y8JJ>] ("Allowing the President to define the scope of his own appointments power would eviscerate the Constitution's separation of powers . . .") (internal quotations omitted).

<sup>111</sup> See Keith et al., *supra* note 8 (commenting that all Board decisions between January 2012 and August 2013 are void); see also Dubé, *supra* note 99 (demonstrating that the impact of *NLRB v. Canning* will be significant); G. Roger King & Bryan J. Leitch, *The Impact of the Supreme Court's Noel Canning Decision – Years of Litigation Challenges on the Horizon for the NLRB*, BLOOMBERG BNA (June 27, 2014), <http://www.bna.com/impact-supreme-courts-n17179891624> [<http://perma.cc/QHT4-58AH>] (explaining the amount of cases which could be overturned both on the regional and national level).

<sup>112</sup> Compare *Labor Board Scrambles After Hundreds of Decisions Thrown into Doubt By Court Ruling*, FOX NEWS (June 27, 2014), <http://www.foxnews.com/politics/2014/06/27/labor-board-scrambles-after-hundreds-decisions-thrown-into-doubt-by-court/> [<http://perma.cc/GP6-EKNU>] (arguing that each case needs to be presented before the Board), with Dubé, *supra* note 99 (stating that some parties might not even appeal).

<sup>113</sup> See Keith et al., *supra* note 8 (discussing the amount of decisions the board might have to reexamine); see also Dubé, *supra* note 99 (articulating that the NLRB has a large amount of cases to reconsider); King & Leitch, *supra* note 111 (analyzing that the resolving of these cases could take years).

<sup>114</sup> See *NLRB v. Canning*, 134 S. Ct. 2550, 2578 (2014) (holding that the Recess Appointments Clause did not give President Obama the constitutional authority to make the appointments at issue); see also Mark L. Shapiro et al., *United States: The Supreme Court's Noel Canning Decisions and the NLRB's Response*, MONDAQ (July 17, 2014), <http://www.mondaq.com/unitedstates/x/328048/employee+rights+labour+relations/The+Supreme+Courts+Noel+Canning+Decision+and+the+NLRBs+Response> [<http://perma.cc/6U6P-B7MH>] (advocating that the NLRB needs to act fast on the cases in order to make room for new issues).

<sup>115</sup> See MEMBERS OF THE NLRB SINCE 1935, *supra* note 11 (showing how many members were on the Board at a time).

<sup>116</sup> Harold P. Coxson, *Senate Confirms New Five-Member NLRB: What Just Happened and What's Next?*, OGLETREE DEAKINS (Aug. 1, 2013), <http://blog.ogletreedeakins.com/senate-confirms-new-five-member-nlr-what-just-happened-and-whats-next/> [<http://perma.cc/>]

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political views that play a role in the way the NLRB makes decisions.<sup>117</sup> The views of the members are important because the NLRB has two different sides it could take in almost every case—the employee or the management.<sup>118</sup> These members' terms will end at varying times starting in December 2014; this will be significant because the difference in party alignment during the next term could create a gridlock.<sup>119</sup> In addition, while the new NLRB was trying to patch the damage from *NLRB v. Canning*, the Senate was constructing a new enabling statute for the NLRB.<sup>120</sup> In general, this new board, consisting of three Democrats—one

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576H-SDPR]. The two members who were not invalidated were: Mark Gaston Pearce and Philip A. Miscimarra. *Id.* Mark Pearce has been the chairman of the NLRB since August 27, 2011. NATIONAL LABOR RELATIONS BOARD, THE BOARD: MARK GASTON PEARCE, <http://www.nlr.gov/who-we-are/board/mark-gaston-pearce> [http://perma.cc/4Q3M-K8VJ]. Prior to being on the Board, he was a founding partner at a law firm in Buffalo, New York where he practiced union and plaintiff side labor and employment law. *Id.* Philip A. Miscimarra became a Board member on August 7, 2013. NATIONAL LABOR RELATIONS BOARD, THE BOARD: PHILIP A. MISCIMARRA, <http://www.nlr.gov/who-we-are/board/philip-miscimarra> [http://perma.cc/3TWW-N9H9]. Prior to being a NLRB member, he was a labor and employment law partner at a Chicago law firm. *Id.* He wrote many books on labor law issues, including some on the NLRB. *Id.*

<sup>117</sup> See Coxson, *supra* note 116 (summarizing the positions of the board members). The Senate confirmed three new members to the Board on July 30, 2013: Nancy Schiffer, Harry I. Johnson, III, and Kent Hirozawa. *Id.* Nancy Schiffer is a Democrat who was previously the associate general counsel with the AFL-CIO. *Id.* She has been involved in all aspects of NLRA practice and procedure and has even been a part of the NLRB previously as a field attorney at the Detroit Regional Office. NATIONAL LABOR RELATIONS BOARD, THE BOARD: NANCY J. SCHIFFER, <https://www.nlr.gov/who-we-are/board/nancy-j-schiffer> [http://perma.cc/6K6E-9THR]. Next, Harry I. Johnson, III is a Republican who previously practiced at a management-side law firm in Los Angeles. See Coxson, *supra* note 116 (describing Mr. Johnson's previous positions). He previously worked at Jones Day for a sixteen year period. NATIONAL LABOR RELATIONS BOARD, THE BOARD: HARRY I. JOHNSON, III, <https://www.nlr.gov/who-we-are/board/harry-i-johnson-iii> [http://perma.cc/NZ43-S7J6]. Last, Kent Hirozawa, prior to being appointed to the Board, was chief counsel to Board Chairman Mark Gaston Pearce. Coxson, *supra* note 116. Before this, he worked as a union lawyer for most of his career at a New York law firm. *Id.*; NATIONAL LABOR RELATIONS BOARD, THE BOARD: KENT Y. HIROZAWA, <https://www.nlr.gov/who-we-are/board/kent-y-hirozawa> [http://perma.cc/H6MB-U9XS].

<sup>118</sup> See MCCULLOCH & BORNSTEIN, *supra* note 30, at 72-76 (stating that one side must be chosen and critics of one side will probably disagree). Union and workers' rights supporters typically take the employee's side. *Id.* Upper level management and executives typically take the management's side. *Id.*

<sup>119</sup> See Scott Flaherty, *With Election Win, GOP To Push Legislation To Rein In NLRB*, LAW360 (Nov. 5, 2014, 12:52 AM), <http://www.law360.com/articles/590910/with-election-win-gop-to-push-legislation-to-rein-in-nlr> [http://perma.cc/S6XZ-37QV] (opining that Republicans may have the votes to block nominees); see also Shapiro et al., *supra* note 114 ("There is also the political question of what happens next time there is a vacancy on the board and opposite parties control the White House and the Senate.").

<sup>120</sup> See *infra* Part II.E.2 (explaining the Senate's proposed bill to reform the NLRB's enabling statute).

of them being the chair of the board—and two Republicans, had a significant amount of work to do to get the NLRB caught up on everything.<sup>121</sup>

The NLRB's actions can be split into two parts: the NLRB's Reaction, and the Senate's Proposed Bill.<sup>122</sup> Part II.E.1 discusses the NLRB's action thus far.<sup>123</sup> Part II.E.2 introduces the Senate's new proposed bill and all of the provisions that pertain to the national office of the NLRB, including a new funding requirement.<sup>124</sup>

### 1. The NLRB's Reaction

The new board reacted quickly after the Supreme Court rendered its decision in *NLRB v. Canning*.<sup>125</sup> In less than a month after the Court issued its decision, the NLRB delivered a press release confirming all regional appointments and regional decisions.<sup>126</sup> In addition, the President and

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<sup>121</sup> See NATIONAL LABOR RELATIONS BOARD, BOARD MEMBERS SINCE 1935, <http://www.nlr.gov/who-we-are/board/board-members-1935> [<http://perma.cc/Z3EV-L9UK>] (displaying the makeup of members to the NLRB and their political affiliation); see also Dubé, *supra* note 99 (arguing that these cases will have a big impact on the NLRB's operation); King & Leitch, *supra* note 111 (commenting on the amount of cases the NLRB may have to reexamine); Shapiro et al., *supra* note 114 (explaining that many high profile and controversial decisions were invalidated). The trust in the NLRB was also at issue because many cases could be appealed. See William McQuillen, *NLRB Chief Says Lapses By Flynn Raise Questions of Trust*, BLOOMBERG (May 5, 2012), <http://www.bloomberg.com/news/2012-05-03/nrlb-chief-says-lapses-by-flynn-raise-questions-of-trust.html> [<http://perma.cc/NRL6-HNLF>] (noting that there have been questions of trust in the NLRB).

<sup>122</sup> See *infra* Part II.E.1 (showing the NLRB's action since *NLRB v. Canning*); see also *infra* Part II.E.2 (explaining the Senate's proposed bill).

<sup>123</sup> See *infra* Part II.E.1 (reviewing the NLRB's actions thus far).

<sup>124</sup> See *infra* Part II.E.2 (outlining each section of the Senate's bill).

<sup>125</sup> *NLRB v. Canning*, 134 S. Ct. 2550, 2578 (2014). See Benjamin Goad, *NLRB Ratifies Actions of Unconstitutional Board*, THE HILL (Aug. 8, 2014), <http://thehill.com/regulation/labor/214239-nlr-ratifies-actions-taken-by-unconstitutional-labor-board> [<http://perma.cc/R948-38TJ>] (repeating the NLRB's message from its press release). Because of the press release, the NLRB will have fewer issues that could possibly be reexamined. *Id.*

<sup>126</sup> See Office of Public Affairs, *NLRB Officials Ratify Agency Actions Taken During Period When Supreme Court Held Board Members Were Not Validly Appointed*, NATIONAL LABOR RELATIONS BOARD (Aug. 4, 2014), <https://www.nlr.gov/news-outreach/news-story/nlr-officials-ratify-agency-actions-taken-during-period-when-supreme-court> [<http://perma.cc/XP83-FMCS>] (stating that the NLRB “unanimously ratified all administrative, personnel, and procurement matters taken by the NLRB from January 4, 2012 to August 5, 2013”). This press release allowed the NLRB to ensure that actions taken by the regional members appointed during the time of invalidation could not be appealed. See Barbara E. Hoey & Mark A. Konkel, *NLRB Ratifies All Administrative Actions Taken by the Board During “Noel Canning” Period*, LEXOLOGY (Aug. 20, 2014), <http://www.lexology.com/library/detail.aspx?g=f2680f40-69d1-4254-b694-d49682f99c2e> [<http://perma.cc/JCW8-TYXK>] (referring to the appointment of three regional directors, many ALJs, and the restructuring of offices and departments). The time of invalidation refers to the time when the invalidated members



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Senate agreed on who replaced Nancy Schiffer when her term was up in December 2014.<sup>127</sup> Confirming these officials' actions and appointing a replacement for Schiffer were only two of the many tasks the NLRB checked off its list.<sup>128</sup>

Although the new board avoided reexamination of many regional cases because of the press release confirming all regional directors, there are still around 100 cases the NLRB may be required to revisit with the new valid members.<sup>129</sup> In order for these cases to be re-decided, one of the parties has to request an appeal from a U.S. Court of Appeals.<sup>130</sup> Specifically, seven cases that may be appealed would have a large effect on labor and employment law.<sup>131</sup> If the rulings of these cases change, it

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were a part of the Board.

<sup>127</sup> See Ramsey Cox, *Senate Dems Confirm NLRB Nominee Before GOP Take Over*, THE HILL BLOG (Dec. 8, 2014, 6:18 PM), <http://thehill.com/blogs/floor-action/senate/226369-senate-dems-confirm-nlr-b-nominee-before-gop-take-over> [<http://perma.cc/SST6-XY58>] [hereinafter Cox, *Senate Dems Confirm*] (stating that Lauren McGarity McFerran was confirmed by a 54–40 vote in the Senate). McFerran was a former member of the Senate Health, Education, Labor and Pensions Committee and “will be a great asset to the board.” *Id.* This was an important advancement for the NLRB because without a replacement for Schiffer, there would have been a two-two split between Republican and Democrat members. See MEMBERS OF THE NLRB SINCE 1935, *supra* note 11 (displaying the makeup of members to the NLRB and their political affiliation); see also Carolyn Phenicie, *GOP Strategy on Labor Issues Remains Hazy*, ROLL CALL (Dec. 3, 2014, 2:43 PM), [http://www.rollcall.com/news/gop\\_strategy\\_on\\_labor\\_issues\\_remains\\_hazy-238378-1.html](http://www.rollcall.com/news/gop_strategy_on_labor_issues_remains_hazy-238378-1.html) [<http://perma.cc/Y28U-69XV>] (recognizing that even numbers of Republicans and Democrats can cause gridlock).

<sup>128</sup> Benjamin Goad, *Workload Threatens to Paralyze Labor Board*, THE HILL (July 13, 2014), <http://thehill.com/regulation/labor/212031-new-workload-threatens-to-paralyze-obama-labor-board> [<http://perma.cc/C24F-S788>]. If the NLRB had not ratified the appointment of all of these regional directors and ALJs, the new board would have had hundreds of cases to reexamine because it would not only need to reexamine the cases the national board decided, but also would have to tend to the regional cases that never reached the national level. See *id.* (“[T]he ruling could throw into question more than 400 cases from the period between January 2012, when the appointments were made, and August 2013, when the Senate approved new board members.”). In addition to cases being re-decided, there are new cases which caused more media attention to be focused on the NLRB. See Kate Taylor, *Franchise Industry Strikes Back at NLRB’s “Joint Employer” Decision*, ENTREPRENEUR BLOG (Sept. 23, 2014), <http://www.entrepreneur.com/article/237759> [<http://perma.cc/K62A-2F8J>] (mentioning that some cases the NLRB is deciding will have great economic effect); Erik Wemple, *NLRB Rules Against CNN Over 2003 Reorganization*, WASH. POST (Sept. 15, 2014), <http://www.washingtonpost.com/blogs/erik-wemple/wp/2014/09/15/nlr-b-rules-against-cnn-over-2003-reorganization/> [<http://perma.cc/LRA5-CSAP>] (focusing attention on the NLRB’s recent decisions).

<sup>129</sup> See Hoey & Konkell, *supra* note 126 (stating that the NLRB will still have to revisit the 100 cases which were invalidated).

<sup>130</sup> See 29 U.S.C. § 160(f) (2012) (explaining the appeals process of a final order from the NLRB).

<sup>131</sup> See Jeffrey D. Polsky, *United States: 9 Key NLRB Decisions Invalidated by the Supreme Court’s Noel Canning Decision*, MONDAQ (July 1, 2014), <http://www.mondaq.com/>

would drastically affect how employees, employers, and unions operate on a daily basis.<sup>132</sup> These seven cases can be separated into three different categories: (1) employee policy; (2) union representation; and (3) old precedent.<sup>133</sup>

The employee policy category is comprised of three cases prohibiting employee discussion in some manner.<sup>134</sup> Employee policy governs what

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unitedstates/x/324276/employee+rights+labour+relations/9+Key+NLRB+Decisions+Invalidated+by+the+Supreme+Courts+Noel+Canning+Decision [http://perma.cc/TF9-X535] (summarizing nine cases that are important to track in the upcoming months). This Note addresses seven of the nine cases that fit into the three specific categories.

<sup>132</sup> See *infra* Part III.A (showing what changes would occur if these cases are appealed).

<sup>133</sup> See Polsky, *supra* note 131 (considering certain cases that would have a greater impact than most other cases). Employee policy is comprised of *Fresenius USA Manufacturing, Inc.* and *Hispanics United of Buffalo, Inc.*, *Costco Wholesale Corporation*. *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, 2012–13 NLRB Dec. (CCH) ¶ 15656 at \*4 (Dec. 14, 2012); *Fresenius USA Mfg.*, 358 N.L.R.B. No. 138, 2012–13 NLRB Dec. (CCH) ¶ 15622 at \*8 (Sept. 19, 2012); *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, 2012–13 NLRB Dec. (CCH) ¶ 15602 at \*16 (Sept. 7, 2012). Union representation is comprised of *Alan Ritchey, Inc.* and *Banner Health System*. *Alan Ritchey, Inc.*, 359 N.L.R.B. No. 40, 2012–13 NLRB Dec. (CCH) ¶ 15659 at \*10 (Dec. 14, 2012); *Banner Health*, 358 N.L.R.B. No. 93, 2012–13 NLRB Dec. (CCH) ¶ 15598 at \*2 (July 30, 2012). Old precedent is comprised of *Piedmont Gardens* and *WKTC-TV, Inc.* *Piedmont Gardens*, 359 N.L.R.B. No. 46, 2012–13 NLRB Dec. (CCH) ¶ 15668 at \*5 (Dec. 15, 2012); *WKTC-TV, Inc.*, 359 N.L.R.B. No. 30, 2012–13 NLRB Dec. (CCH) ¶ 15653 at \*8 (Dec. 12, 2012).

<sup>134</sup> See Polsky, *supra* note 131 (displaying the synopsis of the seven cases); see also NATIONAL LABOR RELATIONS BOARD, EMPLOYEE RIGHTS, <http://www.nlr.gov/rights-protect/employee-rights> [http://perma.cc/K5PH-48KH] (describing the employee rights that the NLRB protects). Cases that fit into this category include *Hispanics United of Buffalo, Inc.*, *Fresenius USA Manufacturing, Inc.*, and *Costco Wholesale Corporation*. See *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, 2012–13 NLRB Dec. (CCH) ¶ 15656 at \*1–2, 4 (Dec. 14, 2012) (discussing that discharging employees for Facebook comments written in response to a coworker's criticisms of their job performance violated the NLRA); see also *Fresenius USA Mfg.*, 358 N.L.R.B. No. 138, 2012–13 NLRB Dec. (CCH) ¶ 15622 at \*8 (Sept. 19, 2012) (asserting that an employee may not be suspended and discharged for posting vulgar, offensive, and possibly threatening statements on union newsletters and leaving them in the breakroom); *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, 2012–13 NLRB Dec. (CCH) ¶ 15602 at \*16 (Sept. 7, 2012) (holding that Costco violated Section 8(a)(1) of the NLRA by maintaining rules prohibiting posting, distributing, removing, or altering materials on company property, prohibiting discussing private matters of others including sick calls, Family and Medical Leave Act call-outs, Americans with Disabilities Act accommodations, sensitive information such as payroll, and confidential information such as phone numbers and addresses).

In *Hispanics United of Buffalo*, an employee posted a discriminatory statement about another employee on Facebook and four other employees commented on it. *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, 2012–13 NLRB Dec. (CCH) ¶ 15656 at \*1–2 (Dec. 14, 2012). *Hispanics United of Buffalo* discharged all five employees for this act. *Id.* at \*2. The NLRB ruled that discharging the employees was a violation of the NLRA because the criticisms were undertaken for “mutual aid or protection” as required by Section 7 of the NLRA, which meant it was concerted activity. *Id.*

In *Fresenius USA Manufacturing*, female employees complained about vulgar, offensive,

an employee can and cannot do.<sup>135</sup> These three cases deal with employees who made comments about an employer, another employee, or union.<sup>136</sup> This type of activity is important for employees to be able to organize and express their opinions by utilizing protected concerted activity.<sup>137</sup> The risk in this category of cases being reexamined is that change could cause employees' jobs to be in jeopardy and unfair labor standards to be imposed.<sup>138</sup>

Next, the union representation category involves cases that discuss the rights of the collective bargaining agreements.<sup>139</sup> Union representation

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and threatening statements on union newsletters. *Fresenius USA Mfg.*, 358 N.L.R.B. No. 138, 2012-13 NLRB Dec. (CCH) ¶ 15622 at \*1-2 (Sept. 19, 2012). *Fresenius* investigated the statements, questioned the employee, and as a result of the confirmation of the employee being responsible, suspended and discharged that employee. *Id.* The NLRB ruled that the questioning and investigation was proper, but that the suspension and discharge was not because his comments were classified as protected union activity. *Id.* at \*8.

In *Costco Wholesale Corporation*, an employee of Costco attempted to get others to unionize by passing out material and discussing it with other employees. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, 2012-13 NLRB Dec. (CCH) ¶ 15602 at \*6 (Sept. 7, 2012). The NLRB ruled this to be a violation of Section 8(a)(1) of the NLRA and ordered Costco to cease and desist from this activity and reform its employee agreement. *Id.* at \*16-17.

<sup>135</sup> See Polsky, *supra* note 131 (displaying the seven cases analyzed); see also *supra* note 134 and accompanying text (analyzing the employee policy category). In all of these cases, the NLRB decided in favor of the employee. *Supra* note 134 and accompanying text.

<sup>136</sup> See *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, 2012-13 NLRB Dec. (CCH) ¶ 15656 at \*1-2 (Dec. 14, 2012) (discharging employees for making comments online about another worker); see also *Fresenius USA Mfg.*, 358 N.L.R.B. No. 138, 2012-13 NLRB Dec. (CCH) ¶ 15622 at \*1-2, 8 (Sept. 19, 2012) (analyzing whether an employee writing comments on a newsletter can be disciplined); *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, 2012-13 NLRB Dec. (CCH) ¶ 15602 at \*6 (Sept. 7, 2012) (discussing an employee making comments about a union).

<sup>137</sup> See NLRB, *Basic Guide to the National Labor Relations Act*, NATIONAL LABOR RELATIONS BOARD 2-5, <http://www.nlr.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf> [<http://perma.cc/HPP4-AXHQ>] [hereinafter *Basic Guide*] (explaining Section 7 of the NLRA regarding concerted activity). See also MCCULLOCH & BORNSTEIN, *supra* note 30, at 16-20 (describing the NLRA and its purpose). "A better relationship between labor and management is the high purpose of this act. By assuring the employees the right of collective bargaining it fosters the development of the employment contract on a sound and equitable basis." *Id.*

<sup>138</sup> See *supra* note 134 and accompanying text (showing the facts of each case and explaining the consequence to employees and employers). In fact, on June 24, 2015, the NLRB considered *de novo* the invalidated decision of *Fresenius USA Manufacturing*, and it found that the investigation, suspension, and discharge were all lawful. *Fresenius USA Mfg.*, 362 N.L.R.B. No. 130, 2015 WL 3932160, at \*2-3 (June 24, 2015). This is contrary to the NLRB's first decision in *Fresenius USA Manufacturing* where it stated the suspension and discharge of the employee was a violation of Section 8(a)(3) and (1) of the NLRA. *Fresenius USA Mfg.*, 358 N.L.R.B. No. 138, 2012-13 NLRB Dec. (CCH) ¶ 15622 at \*8 (Sept. 19, 2012).

<sup>139</sup> See Polsky, *supra* note 131 (displaying the synopsis of the seven cases). The cases in this category consist of *Alan Ritchey, Inc.* and *Banner Health System*. See *Alan Ritchey, Inc.*, 359 N.L.R.B. No. 40, 2012-13 NLRB Dec. (CCH) ¶ 15659 at \*10 (Dec. 14, 2012) (ruling that

allows employees to organize and protect their rights.<sup>140</sup> Section 8 of the NLRA addresses collective bargaining and the representation of employees, which is important because, without it, employers could unduly influence employees by making agreements that are favorable to the employer.<sup>141</sup> These cases represent the right of an employee to receive the aid of a union prior to being discharged.<sup>142</sup> If either of these decisions are changed on reexamination, employees would be wary about consulting unions during investigations that would endanger their employment rights.<sup>143</sup> In addition, employers might put less effort into investigations if they knew they could discharge employees without questioning from a union.<sup>144</sup> Overall, this loophole could defeat the essence of the collective bargaining agreement.<sup>145</sup>

Finally the last category, old precedent, deals with cases which overturn longstanding labor and employment law precedent.<sup>146</sup> Old

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discretionary discipline is a mandatory subject of bargaining and that employers may not impose discipline unilaterally); *Banner Health*, 358 N.L.R.B. No. 93, 2012-13 NLRB Dec. (CCH) ¶ 15598 at \*2 (July 30, 2012) (holding that a rule that an employee could not discuss ongoing investigations of employee misconduct was against Section 8(a)(1) of the NLRA).

In *Alan Ritchey, Inc.*, two employees with nine unexcused absences were each given verbal warnings and a written warning. *Alan Ritchey, Inc.*, 359 N.L.R.B. No. 40, 2012-13 NLRB Dec. (CCH) ¶ 15659 at \*3 (Dec. 14, 2012). The company evaluated each situation and discharged what it believed to be the appropriate employees. *Id.* The NLRB examined the policy and ruled that the company should have contacted the union before it imposed any discretionary discipline even though the parties had not signed their contract with the union yet. *Id.* at \*10. In *Banner Health*, the human resources director disciplined the employee and asked the employee not to discuss the matter with coworkers during the ongoing investigation. *Banner Health*, 358 N.L.R.B. No. 93, 2012-13 NLRB Dec. (CCH) ¶ 15598 at \*1 (July 30, 2012). The NLRB held that this was a violation of Section 8(a)(1) of the NLRA because the employer did not show that it had a legitimate interest that outweighed the employee's Section 7 rights. *Id.* at \*2.

<sup>140</sup> See Chris Langford, *Why Collective Bargaining Rights are Important*, INT'L FEDERATION OF PROF'L & TECHNICAL ENG'RS (June 13, 2012), <http://www.ifpte.org/news/details/Why-Collective-Bargaining-Rights-Are-Important> [<http://perma.cc/J57R-8VMS>] (explaining the importance of union representation).

<sup>141</sup> See *Basic Guide*, *supra* note 137, at 6-13 (discussing the requirements of collective bargaining).

<sup>142</sup> See *Alan Ritchey, Inc.*, 359 N.L.R.B. No. 40, 2012-13 NLRB Dec. (CCH) ¶ 15659 at \*10 (Dec. 14, 2012) (regarding consulting a union prior to discretionary discipline); *Banner Health*, 358 N.L.R.B. No. 93, 2012-13 NLRB Dec. (CCH) ¶ 15598 at \*2 (July 30, 2012) (allowing an employee to discuss an ongoing investigation).

<sup>143</sup> See *Basic Guide*, *supra* note 137, at 6-13 (explaining the rights of employees to have a relationship with a union). In fact, on June 26, 2015, the NLRB affirmed the previous vacated opinion in *Banner Health*. *Banner Health*, 362 N.L.R.B. No. 137, 2015 WL 4179691, at \*1 (June 26, 2015).

<sup>144</sup> See *supra* Part II.A (describing the history of the NLRA and why it was created).

<sup>145</sup> See 29 U.S.C. § 157 (2012) (guaranteeing employees the right to collectively bargain).

<sup>146</sup> See *Polsky*, *supra* note 131 (depicting the cases which could affect old precedent). Two important decisions in this category are *Piedmont Gardens* and *WKTC-TV, Inc.* See *Piedmont*

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precedent provides employers, employees, and unions a guide for future policies and disputes.<sup>147</sup> Specifically, both of the cases in this category involve union representation and an employer making a decision without union consultation.<sup>148</sup> If these rulings changed on reexamination, employers would believe that they could consult the union less in decisionmaking.<sup>149</sup> Old precedent cases are important because they serve as reminders that the NLRA created the NLRB and the NLRA must be

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Gardens, 359 N.L.R.B. No. 46, 2012–13 NLRB Dec. (CCH) ¶ 15668 at \*5 (Dec. 15, 2012) (overruling a fifty-five year precedent and stating that an employer violated the NLRA by failing to provide the witnesses' names and job titles); WKTC-TV, Inc., 359 N.L.R.B. No. 30, 2012–13 NLRB Dec. (CCH) ¶ 15653 at \*8 (Dec. 12, 2012) (overruling an old precedent and stating that an employer, at the expiration of a union contract, must continue to honor a dues checkoff arrangement until the employee and employer can reach an agreement or a valid "impasse" permits unilateral modification by the employer).

In *Piedmont Gardens*, a nurse observed another nurse sleeping on the job, but the nurse who observed the conduct did not report it; an assistant reported it. *Piedmont Gardens*, 359 N.L.R.B. No. 46, 2012–13 NLRB Dec. (CCH) ¶ 15668 at \*1–2 (Dec. 15, 2012). After the observing nurse found out that someone else reported the incident, she wrote a statement reporting the conduct. *Id.* at \*2. After, both the observing nurse and the assistant were asked to compile another statement of the incident and after examining the statements, the sleeping nurse was fired. *Id.* The union requested the documents in the investigation, but the employer refused to turn them over. *Id.* The NLRB held that when the union asked for the statements, the employer was required to turn them over because not turning them over violated Section 8(a)(5) and (1) of the NLRA. *Id.* at \*5–6.

In *WKTC-TV, Inc.*, the employee and employer were parties to multiple collective bargaining agreements. *WKTC-TV, Inc.*, 359 N.L.R.B. No. 30, 2012–13 NLRB Dec. (CCH) ¶ 15653 at \*1 (Dec. 12, 2012). In the most recent collective bargaining agreement there was a "dues checkoff[.]" which is when the employer takes the union dues out of a paycheck automatically. *Id.* at \*1–2. The current agreement ended and a new agreement was being negotiated. *Id.* In the meantime, the employer stopped collecting the dues without consulting the union. *Id.* The NLRB ruled this action to be against Section 8(a)(5) of the NLRA and that the employer should have honored the dues checkoff arrangements post-contract expiration. *Id.* at \*8.

<sup>147</sup> See Frederick Schauer, *Precedent*, 39 STAN L. REV. 571, 572–73 (1987) (explaining the importance of precedent). Schauer opined that:

An argument from precedent seems at first to look backward. The traditional perspective on precedent . . . has therefore focused on the use of yesterday's precedents in today's decisions. But in an equally if not more important way, an argument from precedent looks forward as well, asking us to view today's decision as a precedent for tomorrow's decisionmakers. Today is not only yesterday's tomorrow; it is also tomorrow's yesterday.

*Id.*

<sup>148</sup> *Piedmont Gardens*, 359 N.L.R.B. No. 46, 2012–13 NLRB Dec. (CCH) ¶ 15668 at \*5 (Dec. 15, 2012); *WKTC-TV, Inc.*, 359 N.L.R.B. No. 30, 2012–13 NLRB Dec. (CCH) ¶ 15653 at \*2 (Dec. 12, 2012). If these cases are appealed, union membership could decline and more employees could be fired without just cause. See *supra* note 146 and accompanying text (describing the facts of each case).

<sup>149</sup> See 29 U.S.C. § 158 (2012) (explaining that never consulting with a union can be an unfair labor practice).

followed.<sup>150</sup> Overall, the three categories of cases encompass some of the most important issues in the realm of labor and employment law.<sup>151</sup>

## 2. The Senate's Proposed Bill

The Senate suggested its own solution to the NLRB's problems.<sup>152</sup> On September 16, 2014, the Republican leaders in the Senate proposed a bill to amend the NLRA to reform the NLRB.<sup>153</sup> The bill, which is called the National Labor Relations Board Reform Act ("the Bill"), proposes a new structure, appointment procedure, and requirements for both a quorum and funding.<sup>154</sup>

The new structure the Bill proposes is to change the Board to six-members with three Democrats and three Republicans.<sup>155</sup> These members

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<sup>150</sup> See *Basic Guide*, *supra* note 137, at 6–13 (showing the requirements an employer must follow). In fact, on June 26, 2015, the NLRB affirmed the previous vacated opinion in *Piedmont Gardens*. *Piedmont Gardens*, 362 N.L.R.B. No. 139, 2015 WL 4179692, at \*8 (June 26, 2015).

<sup>151</sup> See 29 U.S.C. § 158 (displaying the unfair labor practices).

<sup>152</sup> See Brian Mahoney, *GOP Senators Unveil National Labor Relations Board Overhaul*, POLITICO (Sept. 16, 2014), <http://www.politico.com/story/2014/09/national-labor-relations-board-members-111010.html> [<http://perma.cc/N42A-UMLB>] (asserting that the NLRB Reform Act will "change the NLRB from an advocate to an umpire"); see also Ramsey Cox, *McConnell Pushes NLRB Reforms*, THE HILL BLOG (Sept. 16, 2014, 10:45 AM), <http://thehill.com/blogs/floor-action/senate/217832-mcconnell-pushes-nlr-reforms> [<http://perma.cc/4NHD-NVKU>] (providing that this would "take the politics out of it"). But see Thomas E. Mann, *Admit It, Political Scientists: Politics Really Is More Broken Than Ever*, THE ATLANTIC (May 26, 2014), <http://www.theatlantic.com/politics/archive/2014/05/dysfunction/371544/> [<http://perma.cc/9FTG-9K4L>] (reporting that politics are more broken than ever and everything is becoming dysfunctional); see also Aaron Blake, *Gridlock in Congress? It's Probably Even Worse Than You Think*, WASH. POST (May 29, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/05/29/gridlock-in-congress-its-probably-even-worse-than-you-think/> [<http://perma.cc/3VAC-NLXA>] (explaining that gridlock has more than doubled since the 1950s).

<sup>153</sup> S. 2814, 113th Cong. (2014). See Eleanor Vaida Gerhards, *United States: In Wake of McDonald's, GOP Senate Proposes Bill to Restructure National Labor Relations Board*, MONDAQ (Sept. 19, 2014), <http://www.mondaq.com/unitedstates/x/341246/employee+rights+labour+relations/In+Wake+of+McDonalds+GOP+Senate+Proposes+Bill+to+Restructure+National+Labor+Relations+Board> [<http://perma.cc/P3QJ-GCND>] (discussing the Senate's proposed new structure to the NLRB).

<sup>154</sup> S. 2814, 113th Cong. The bill is modeled off of the Federal Election Commission, which is known to be one of the most ineffective independent agencies. See 2 U.S.C. § 437c(a)(1)–(2)(B) (2012) (reviewing the Federal Election Commission's structure); Michael M. Franz, *The Devil We Know? Evaluating the Federal Election Commission as Enforcer*, 8 ELECTION L.J. 167, 167 (2009) (stating that the Federal Election Commission is one of the most ineffective agencies and Congress designed it to be slow and ineffective).

<sup>155</sup> S. 2814, 113th Cong. § 2(a). This section states that it will amend 29 U.S.C. § 153(a): [B]y striking "five instead of three members" and inserting "6 instead of 5 members"; and . . . by striking "appointed by the President by and with the Advice and Consent of the Senate" and inserting "appointed

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would be “appointed by the President, after consultation with the leader of the Senate representing the party opposing the party of the President, by and with the consent of the Senate.”<sup>156</sup> In addition, two members’ terms would end at the same time, one being Republican and the other being Democrat.<sup>157</sup>

Next, the Bill proposes new requirements.<sup>158</sup> One of those requirements is to change the quorum requirement from three to four members.<sup>159</sup> In addition, there must be a balance of Republicans and Democrats in the quorum, which means there has to be at least two Republicans and two Democrats in favor of the holding in each case.<sup>160</sup> The other new requirements address funding of the NLRB.<sup>161</sup> First, there

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by the President, after consultation with the leader of the Senate representing the party opposing the party of the President, by and with the advice and consent of the Senate . . . .”

*Id.* § 2(a)(1)(B)–(C). It also adds that “[o]f the 6 members, there shall be 3 members representing each of the 2 major political parties . . . .” *Id.* § 2(a)(2).

<sup>156</sup> *Id.* § 2(a)(1)(C).

<sup>157</sup> See *id.* § 2(a)(2) (requiring two members of opposite political parties to have terms ending on the same date).

<sup>158</sup> See *id.* § 2 (establishing new requirements for the NLRB).

<sup>159</sup> S. 2814, 113th Cong. § 2(b). This section amends 29 U.S.C. § 153(b):

[B]y striking “three or more” and inserting “4 or more”; . . . by inserting before the period following: “, with such group consisting of an equal number of members representing each major political party”; . . . by striking “three members” and inserting “4 members”; and . . . by striking “Board, except that” and all that follows through “hereof.” And inserting the following: “Board. Any determination of the Board shall be approved by majority of the members present.”

*Id.* § 2(b)(1).

<sup>160</sup> See *id.* § 2(b)(1)(B) (commenting that a quorum shall consist of “an equal number of members representing each major political party”). This means that two members will have to vote against party lines to make a decision. See Dave Jamieson, *Republican Proposal for Labor Law Reform “A Disgrace,” Says Labor Leader*, HUFF. POST (Sept. 18, 2014, 11:59 AM), [http://www.huffingtonpost.com/2014/09/17/labor-law-reform\\_n\\_5838922.html](http://www.huffingtonpost.com/2014/09/17/labor-law-reform_n_5838922.html) [<http://perma.cc/57H2-6K3U>] (discussing that there must be an even amount of political parties to have a vote).

<sup>161</sup> See S. 2814, 113th Cong. § 20 (creating funding requirements for the NLRB). This section would add the following to 29 U.S.C. § 153:

If, 2 years after the date of the enactment the National Labor Relations Board Reform Act, the Board has failed to issue a final order, in accordance with section 10(d), on more than 90 percent of the cases pending on (or filed on or after) such date of enactment, then the amount authorized to be appropriated to carry out this Act for each of the succeeding 2 fiscal years shall be 80 percent of the average amount so authorized for the prior 2 fiscal years. . . . If, 4 years after the date of the enactment of the National Labor Relations Board Reform Act, the Board has failed to issue a final order, in accordance with section 10(d), on more than 90 percent of the cases pending on (or filed on or after) the date that is 2 years after the date of such enactment, then the amount

is a two-year deadline that proposes within the first two years after the Bill's enactment if the NLRB fails to come to a final order in ninety percent or more of its cases, the NLRB will lose twenty percent of its funding.<sup>162</sup> Next, there is a four-year deadline that lengthens the two-year requirement.<sup>163</sup> The Bill states that if the NLRB has not decided ninety percent or more of its cases within the first four years of the Bill's enactment, then the NLRB shall keep the twenty percent budget reduction for each succeeding year.<sup>164</sup> Overall, the Bill could change the NLRB's entire structure.<sup>165</sup>

#### F. The Federal Communications Commission

If the NLRB changes its structure or enabling statute in the future, it could use other independent agencies as a guide.<sup>166</sup> Many other independent agencies have similar structures to the NLRB, such as the Federal Communications Commission ("FCC").<sup>167</sup> The FCC is similar to the NLRB in the way that it operates.<sup>168</sup>

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authorized to be appropriated to carry out this Act for each succeeding fiscal year shall remain the amount so appropriated for the fiscal year that is 4 years after the date of such enactment.

*Id.* § 20(a)–(b).

<sup>162</sup> *Id.* § 20(a). There was a house bill in 2011, which also called for a funding decrease, but the bill did not pass. See H.R. 1, 112th Cong. (2011) (asking for an eighteen percent decrease in the NLRB's budget); see also Kahlenberg & Marvit, *supra* note 80, at 225–26 n.67 (describing two House bills that attempted to decrease the funding of the NLRB).

<sup>163</sup> S. 2814, 113th Cong. § 20(a)–(b).

<sup>164</sup> *Id.*

<sup>165</sup> See *infra* Part III.B (analyzing the Senate's bill).

<sup>166</sup> See, e.g., 7 U.S.C. § 2 (2012) (allowing Commodity Future's Trading Commission members to continue their term until another member is appointed); 15 U.S.C. § 41 (2012) (permitting a Federal Trade Commission member's term to extend until another member is appointed); 15 U.S.C. § 2053(b) (2012) (establishing that a Consumer Product Safety Commission member's term may extend until another member is appointed except that it is not to extend more than a year from the original end of their term); 19 U.S.C. § 1330(b)(2) (2012) (permitting an International Trade Commission member's term to extend until another member is appointed); 47 U.S.C. § 154(c) (2012) (stating that a Federal Communications Commission member's term shall continue until another member is appointed or until the end of the next congressional session); 49 U.S.C. § 1111 (2012) (expanding that a National Transportation Safety Board's member may serve until another member is appointed); see also Kali Borkoski, *Political Consequences of NLRB v. Noel Canning*, SCOTUS BLOG (July 15, 2014, 1:35 PM), <http://www.scotusblog.com/2014/07/political-consequences-of-nlr-b-v-noel-canning/> [<http://perma.cc/YC2Z-ANQD>] (opining that the NLRB could use a holdover period similar to what some other administrative agencies use).

<sup>167</sup> See 47 U.S.C. § 154 (enabling the FCC to operate). The FCC has both a similar structure to the NLRB and the members' terms are the same amount of years in length. See *id.* (explaining the FCC's structure and membership terms).

<sup>168</sup> *Id.* Compare FEDERAL COMMUNICATIONS COMMISSION, WHAT WE DO, <http://www.fcc.gov/what-we-do> [<http://perma.cc/HL7J-76KA>] [hereinafter FCC, WHAT



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The FCC is comprised of five commissioners, which the President nominates and the Senate confirms.<sup>169</sup> FCC members serve five year terms, which end when another member is appointed or at the end of the next congressional session after their term ends.<sup>170</sup> One of the commissioners is designated as a chairman, but all of the commissioners work together in the regulation of communication services around the United States.<sup>171</sup>

In 1934, the FCC was created to regulate the radio, and now it does that and more by regulating radio, television, wire, satellite, and cable.<sup>172</sup> The FCC is the primary authority for communications law similar to the NLRB as the primary authority for labor law.<sup>173</sup> Overall, the FCC regulates communications law to ensure everyone's rights are respected.<sup>174</sup>

Due to the changes resulting from *New Process Steel, L.P. v. NLRB* and *NLRB v. Canning*, the NLRB could decline in membership and not be able to operate.<sup>175</sup> Understanding the effect these changes have and the Senate's proposed solution is paramount to the realization that a change is needed.<sup>176</sup> Thus, Part III analyzes these changes to the NLRB and proposes Congress amend the NLRB's enabling statute.<sup>177</sup>

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WE DO] (regulating "interstate and international communications . . . [as] the United States' primary authority for communications law, regulation and technological innovation"), with WHAT WE DO, *supra* note 3 ("[The NLRB acts as a] safeguard [for] employees' rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent and remedy unfair labor practices committed by private sector employers and unions.").

<sup>169</sup> 47 U.S.C. § 154.

<sup>170</sup> *Id.* § 154(c). The FCC's enabling statute states in relevant part:

[C]ommissioners shall be appointed for terms of five years and until their successors are appointed and have been confirmed and taken the oath of office, except that they shall not continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office . . . .

*Id.*

<sup>171</sup> *Id.* This is similar to the commissioner's role on the NLRB. See 29 U.S.C. § 153(a) (2012) ("The President shall designate one member to serve as Chairman of the Board.").

<sup>172</sup> See FCC, WHAT WE DO, *supra* note 168 (explaining the FCC's duties).

<sup>173</sup> *Id.*; see Millhiser, *supra* note 4 (stating that without the NLRB no one will protect workers' rights). In addition, the FCC has many other bureaus and offices, which split up the functions of the FCC. See FEDERAL COMMUNICATIONS COMMISSION, BUREAUS & OFFICES, <http://www.fcc.gov/bureaus-offices> [<http://perma.cc/4G9F-7QJT>] (displaying all the offices the FCC is split into). The FCC has seven different bureaus that each focus on a different part of regulation in communications law. *Id.* There are also eleven different offices, which house the departments of the FCC. *Id.*

<sup>174</sup> FCC, WHAT WE DO, *supra* note 168.

<sup>175</sup> See *supra* Part II.C-D (explaining the case law that affected the NLRB).

<sup>176</sup> See *infra* Part III (exploring the effects on the NLRB and the Senate's proposed bill).

<sup>177</sup> See *infra* Part III (analyzing how these changes affect the NLRB as a whole and

## III. ANALYSIS

Despite the NLRB having a new five-member board and making minor temporary fixes, it has not implemented a long-term fix to ensure trust in future boards and to decrease the likelihood of falling below a valid quorum again.<sup>178</sup> In order for the NLRB to continue protecting employee, employer, and union rights and remain operating as a decision maker to stop unfair labor practices, it must maintain enough members to constitute a quorum.<sup>179</sup> Thus, the NLRB's enabling statute must change to allow the NLRB to safeguard itself from falling to fewer than three members and becoming nonoperational.<sup>180</sup>

Part III.A examines the effect on current issues, importance of party alignment, trust in the NLRB, and possibility of a declining membership.<sup>181</sup> Next, Part III.B discusses the Senate's proposed bill to change the composition of the NLRB.<sup>182</sup> Last, Part III.C proposes an amendment to the NLRB's enabling statute that would allow the NLRB to maintain its quorum for a longer period of time, and addresses the possible counterarguments to the amendment.<sup>183</sup>

A. *The Future of the NLRB*

*NLRB v. Canning* allowed many cases to be appealed.<sup>184</sup> Any case the invalidated members took a part in may be appealed, but the seven cases previously discussed would have the greatest effect on labor and employment law as a whole.<sup>185</sup> Each of these cases are important to labor and employment law and could result in changes to the employees', employers', and unions' position in each case if it were appealed.<sup>186</sup>

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proposing an amendment to its' enabling statute).

<sup>178</sup> See *infra* Part III.C.1 (establishing a long term fix for the Board).

<sup>179</sup> See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 679–88 (2010) (explaining the quorum requirement that was established); see also *RIGHTS WE PROTECT*, *supra* note 3 (displaying the rights that the NLRB protects).

<sup>180</sup> See *supra* Part II.C-D (describing two instances when the NLRB's membership fell below three).

<sup>181</sup> See *infra* Part III.A (exploring the NLRB's future).

<sup>182</sup> See *infra* Part III.B (examining the Bill and why it will not work).

<sup>183</sup> See *infra* Part III.C (proposing a change to the NLRB's enabling statute and addressing the possible counterarguments).

<sup>184</sup> See *supra* Part II.D (explaining *NLRB v. Canning*); see also Keith et al., *supra* note 8 (stating that all decisions the NLRB decided from January 2012 until August 2013 are void).

<sup>185</sup> See Polsky, *supra* note 131 (noting seven cases, which could have a great effect on labor and employment law); see also *supra* notes 134, 139, 146 and accompanying text (presenting the seven cases, their facts, and how the courts held in each situation).

<sup>186</sup> See *supra* Part II.E.1 (describing why each category is important).

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In addition to upsetting many cases, the *NLRB v. Canning* decision could also affect the future of the NLRB.<sup>187</sup> The NLRB's staff and the five board members is a small group of people to do a large amount of work, and with disruption, this task becomes even more difficult.<sup>188</sup> The NLRB also needs the citizens' trust in order for employers, employees, and unions to abide by its decisions.<sup>189</sup> If there is no trust in the NLRB's decisions, employees will be unlikely to speak up and the federal court system will become more involved in the labor and employment sector in the United States.<sup>190</sup> Overall, it is important for the NLRB to operate smoothly and efficiently to achieve its goals and keep the trust of the citizens it serves.<sup>191</sup>

Part III.A.1 reviews the current board operations and how the NLRB is anticipating change in the near future.<sup>192</sup> Next, Part III.A.2 examines how party alignment affects the NLRB.<sup>193</sup> Then, Part III.A.3 discusses the public's trust in the NLRB and why it is important to maintain.<sup>194</sup> Last, Part III.A.4 explores how history repeated itself and the future dangers the NLRB could face.<sup>195</sup>

### 1. Current Board Operations

There are many cases that could change how employers, employees, and unions cooperate with one another.<sup>196</sup> A change in these rulings could

<sup>187</sup> See *supra* Part II.D (discussing the *NLRB v. Canning* decision).

<sup>188</sup> See *supra* Part II.B (explaining the structure of the NLRB); see also *infra* Part III.A.1-2 (displaying the current board operations and how the NLRB can make changes to its membership).

<sup>189</sup> See *infra* Part III.A.3 (stating how the NLRB is trying to establish more trust).

<sup>190</sup> See *infra* Part III.A.3 (explaining why trust in the NLRB's decisions is important); see also *infra* Part III.A.4 (describing and analyzing the involvement of the federal courts).

<sup>191</sup> See *infra* Part III.A.3 (considering the importance of trust in the NLRB's decisions).

<sup>192</sup> See *infra* Part III.A.1 (explaining how changes could affect the current operations of the NLRB).

<sup>193</sup> See *infra* Part III.A.2 (displaying the importance of party alignment).

<sup>194</sup> See *infra* Part III.A.3 (analyzing the public's trust in the NLRB and why it is important).

<sup>195</sup> See *infra* Part III.A.4 (illustrating the importance of history and how it could affect the NLRB's future).

<sup>196</sup> See *supra* notes 134-51 and accompanying text (explaining some of the cases which could change and why they are important). The three categories are employee policy, union representation, and old precedent. See *supra* note 131 (noting the three categories). Employee policy is comprised of: *Hispanics United of Buffalo, Inc.*, *Fresenius USA Manufacturing, Inc.*, and *Costco Wholesale Corporation*. *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, 2012-13 NLRB Dec. (CCH) ¶ 15656 at \*4 (Dec. 14, 2012); *Fresenius USA Mfg.*, 358 N.L.R.B. No. 138, 2012-13 NLRB Dec. (CCH) ¶ 15622 at \*8 (Sept. 19, 2012); *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, 2012-13 NLRB Dec. (CCH) ¶ 15602 at \*16 (Sept. 7, 2012). Union representation is comprised of: *Alan Ritchey, Inc.* and *Banner Health System*. *Alan Ritchey, Inc.*, 359 N.L.R.B. No. 40, 2012-13 NLRB Dec. (CCH) ¶ 15659 at \*10 (Dec. 14, 2012); *Banner Health*, 358 N.L.R.B. No. 93, 2012-13 NLRB Dec. (CCH) ¶ 15598 at \*2 (July 30, 2012). Old

give the employer too much power and effectively eliminate unions altogether, which would decrease the enforcement of employees' rights.<sup>197</sup> If the NLRB reexamines these rulings, each ruling will take time and resources from the NLRB and the parties because of the importance of these issues.<sup>198</sup>

In addition to the possibility of many cases being reconsidered, the NLRB as an entity is at stake.<sup>199</sup> Even with a full five members, the NLRB has many extraneous issues that need to be considered at the same time as any case that it is currently deciding.<sup>200</sup> *NLRB v. Canning*, although decided in July 2014, will continue to disrupt the NLRB's function until every case that can be appealed is re-decided.<sup>201</sup> If time has to be spent on deciding issues that were already decided, the NLRB will have to take its focus off of what is currently happening in the labor and employment sector.<sup>202</sup>

Even though the NLRB has not re-examined any cases, there have been multiple instances when the current Board's focus shifted to past problems, including: the unanimous ratification of administrative, personnel, and procurement matters; the heightened media focus on the NLRB causing it to weigh in on many extraneous issues; and the discussion of a possible change in the NLRB's makeup proposed by the Senate's new bill.<sup>203</sup> Since the NLRB's focus shifted to these issues, until

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precedent is comprised of: *Piedmont Gardens* and *WKTC-TV, Inc.* Piedmont Gardens, 359 N.L.R.B. No. 46, 2012-13 NLRB Dec. (CCH) ¶ 15668 at \*5 (Dec. 15, 2012); *WKTC-TV, Inc.*, 359 N.L.R.B. No. 30, 2012-13 NLRB Dec. (CCH) ¶ 15653 at \*8 (Dec. 12, 2012).

<sup>197</sup> See Millhisser, *supra* note 4 (illustrating the effect of giving employers too much power); see also King & Leitch, *supra* note 111 (analyzing the impact of *NLRB v. Canning*). However, if the NLRB's membership stays the same, the rulings might not change at all. See Dubé, *supra* note 99 (explaining that because the Board makeup is the same there will probably be no "major policy shifts").

<sup>198</sup> See King & Leitch, *supra* note 111 (stating that reexamining cases could take an extraordinary amount of time).

<sup>199</sup> See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 688 (2010) (holding that there was not a valid quorum of members); see also *NLRB v. Canning*, 134 S. Ct. 2550, 2578 (2014) (invalidating President Obama's recess appointments to the NLRB, which took away the valid quorum).

<sup>200</sup> See Millhisser, *Nuclear Option*, *supra* note 14 ("[A]ll five slots on the NLRB are now filled by Senate-confirmed appointees — this solution is only temporary. NLRB members serve five year terms, so the Senate GOP will get another opportunity to shut down federal labor law when these terms expire . . .").

<sup>201</sup> See *Canning*, 134 S. Ct. at 2578 (holding that three of President Obama's recess appointments were invalid and requiring all of those members to vacate the NLRB).

<sup>202</sup> See *supra* Part II.E.1 (describing the cases that may have to be examined).

<sup>203</sup> See Office of Public Affairs, *supra* note 126 (ratifying all administrative, personnel, and procurement matters); see also Mahoney, *supra* note 152 (commenting that this bill is a needed reform for the NLRB due to one-sided decisions); Taylor, *supra* note 128 (opining that some of the cases the NLRB is currently deciding will have a big impact on companies and the

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the NLRB resolves these matters, it will continue to take its eyes off current issues.<sup>204</sup>

Although a replacement was found for Nancy Schiffer's position on the NLRB, there is still a concern that when Harry Johnson's and Kent Hirozawa's terms end in the next two years, there will be no replacements.<sup>205</sup> In January 2015, the Senate will have a Republican majority and the President will still be a Democrat, which means gridlock is likely because there will probably not be an agreement on a presidential appointment.<sup>206</sup> In addition, depending on the results of the next presidential election, gridlock could remain, which is why an amendment is needed to the NLRB's enabling statute.<sup>207</sup>

## 2. The NLRB Should be Modified to be Able to Withstand Party Alignment

The Senate's alignment is important to the NLRB because it determines whether a President's NLRB nomination is confirmed.<sup>208</sup> In the past, when the President appointed a member belonging to the political party opposite to the majority in the Senate, the nomination was not confirmed.<sup>209</sup> Recently, the Senate proposed the "nuclear option" to prevent the delay of appointments; however, the "nuclear option" still requires a Senate majority to vote in favor of the nomination.<sup>210</sup> Although

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economy); Wemple, *supra* note 128 (remarking that the NLRB's ruling for CNN was drastic for affected workers).

<sup>204</sup> See Shapiro et al., *supra* note 114 (showing that some of the cases the NLRB may have to reexamine are controversial decisions); see also Dubé, *supra* note 99 (admitting that this reexamination will take the NLRB a lot of time); King & Leitch, *supra* note 111 (noting the amount of cases the NLRB may have to reexamine); *supra* note 203 and accompanying text (explaining all the current issues the NLRB's focus shifted to).

<sup>205</sup> See Shapiro et al., *supra* note 114 (adding that if the Senate and President disagree on appointees for these nominations, the NLRB will be in trouble); see also *supra* Part II.E (discussing the aftermath of *NLRB v. Canning*).

<sup>206</sup> See Flaherty, *supra* note 119 (stating that Republicans could vote against any appointments President Obama makes); see also ROSENFELD, *supra* note 35, at 16–18 (expanding on the concepts that Republicans do not support unions and the comparison to supporting the NLRB).

<sup>207</sup> See *infra* Part III.C.1 (explaining the proposed amendment to the NLRB's enabling statute).

<sup>208</sup> See U.S. CONST. art. II, § 2, cl. 2 (establishing presidential appointment power); see also *supra* Part II.B (explaining the presidential appointment process, and the requirement that both steps of the process be met in order for someone to be appointed to the NLRB).

<sup>209</sup> See, e.g., *Nominations Failed/Returned*, UNITED STATES SENATE (Jan. 3, 2014), [https://www.senate.gov/pagelayout/legislative/one\\_item\\_and\\_teasers/nom\\_rtn.htm](https://www.senate.gov/pagelayout/legislative/one_item_and_teasers/nom_rtn.htm) [<http://perma.cc/EBF9-6FXJ>] (displaying a list of executive nominations returned to the President during the current Congress).

<sup>210</sup> See Wolf, *supra* note 72 (describing all of the components of the "nuclear option"). See also Millhiser, *Nuclear Option*, *supra* note 14 (stating the reasons why the Senate invoked the

this new option puts less of a burden on the agreement of the Senate and the President, the Senate can still delay the confirmation if they do not agree with the President's nomination simply by a majority not voting in favor of the nomination.<sup>211</sup>

The checks and balances system of presidential appointment is important to ensure one branch does not have too much power.<sup>212</sup> Unfortunately, in a political gridlock, the checks and balances system provides a daunting obstacle for appointment.<sup>213</sup> In short, if there is not an agreement on a nomination, no one will be appointed to the NLRB, and without recess appointment power, the NLRB will not receive new members until the President and Senate agree.<sup>214</sup>

The President's party affiliation is also an important factor regarding members being appointed to the NLRB.<sup>215</sup> Although the NLRB performs many functions in labor and employment law, the NLRA created the NLRB to ensure workers were able to collectively bargain and join unions; many people are not in favor of keeping the NLRB operational for this reason.<sup>216</sup> In the past, some Presidents, notably Republicans, have not appointed members to the NLRB for many years during their terms.<sup>217</sup> Although this neglect has not destroyed the NLRB, with time, the lack of

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"nuclear option").

<sup>211</sup> See Hatch, *supra* note 71, at 12 (stating that the threshold for nominations is now a majority of Senate members rather than two-thirds). Even with the "nuclear option" imposed, there still has to be a vote of fifty-one Senate members in favor of appointing the nominee. *Id.*

<sup>212</sup> See U.S. CONST. art. II, § 2, cl. 2 (giving the President the power to appoint members to administrative positions with the advice and consent of the Senate).

<sup>213</sup> See *id.* (requiring both the President and Senate to agree on an appointment). Although this Note does not address a change to the appointment process, it seems that a change is needed to ensure one party or branch cannot prevent appointments from being made.

<sup>214</sup> See Shapiro et al., *supra* note 114 (arguing that the next time there is a vacancy on the NLRB and the President and Senate do not agree, there could be problems). If no one is appointed, the NLRB's membership will fall, which could result in gridlock on decision-making if there are two members from either party on the Board. *Id.*

<sup>215</sup> See Kahlenberg & Marvit, *supra* note 80, at 225 (explaining all the ways partisanship interrupted appointing members to the NLRB); see also *supra* note 79 and accompanying text (comparing the President's nominations to the NLRB).

<sup>216</sup> See MCCULLOCH & BORNSTEIN, *supra* note 30, at 16-20 (describing the creation of the NLRB and the NLRB's relation to collective bargaining and union membership). The NLRB has a history of supporting unions, and it is a known fact that many Republicans are not union supporters. See also ROSENFELD, *supra* note 35, at 16-18 (elaborating further on the Republican disapproval of unions).

<sup>217</sup> Compare BOARD MEMBERS SINCE 1935, *supra* note 11 (showing when each member of the NLRB was appointed), with Prints and Photographs Division, *supra* note 79 (presenting a list of all of the Presidents and the years they served). For example, President George W. Bush did not appoint anyone to the NLRB between the beginning of 2006 until the end of his term in 2009, which left the board with only two members from 2008 until 2010. *Id.*

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appointment by Presidents and the lack of agreement between the President and the Senate could destroy the NLRB.<sup>218</sup>

The NLRB's operation depends on the Senate, the President, and their party alignment.<sup>219</sup> This Note does not propose to ameliorate the cooperation problems between the Senate and the President, but rather proposes a solution that will allow the NLRB to continue operation for a longer period of time if the Senate and President do not agree.<sup>220</sup>

### 3. Trust in the NLRB's Decisions

*NLRB v. Canning* not only invalidated many cases, but also caused the NLRB to lose the public's trust in its decision making.<sup>221</sup> In the past five years, as a result of not having a valid quorum, there have been two instances where hundreds of cases were invalidated.<sup>222</sup> When the NLRB decides cases, the parties expect that these decisions are final unless a party appeals to a federal court.<sup>223</sup> Since the NLRB's invalidations, this

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<sup>218</sup> See U.S. CONST. art. II, § 2, cl. 2 (demonstrating the requirement of the advice and consent of the Senate in order to appoint members to administrative agencies). In addition to the problems of appointment and agreement, the lack of union support and the dissolution of unions could have an adverse effect on the NLRB. See *Labor Day Brings Focus to Economy*, *supra* note 35 (showing a declining union membership). See also Kahlenberg & Marvit, *supra* note 80, at 225 (stating the ways that conservatives in 2011 attempted to limit the NLRB's power). Critics Kahlenberg and Marvit stated that:

In 2011 alone, there were a variety of approaches that conservatives took to limit the Board's power, including Republican senators' refusal to confirm President Obama's appointments to the Board, threats by Republican members of the Board to resign in order to strip the Board of a quorum and therefore its ability to adjudicate allegations of unfair labor practices, the introduction of legislation designed to partially or fully defund the Board, and the introduction of legislation designed to abolish the Board and transfer its functions to the Department of Justice.

*Id.*

<sup>219</sup> See U.S. CONST. art. II, § 2, cl. 2 (presenting the requirements for presidential appointment); see also *supra* note 209 and accompanying text (displaying how many nominations failed confirmation to an administrative agency and how many have been returned to the President).

<sup>220</sup> See *infra* Part III.C (establishing a solution for the NLRB's operation and appointment problems).

<sup>221</sup> See McQuillen, *supra* note 121 (raising issues of trust in past NLRB actions). These issues of trust "add to the criticism of the board, which mediates disputes between labor and employers." *Id.*

<sup>222</sup> See *NLRB v. Canning*, 134 S. Ct. 2550, 2578 (2014) (invalidating President Obama's recess appointments to the NLRB); *New Process Steel v. N.L.R.B.*, 560 U.S. 674, 688 (2010) (requiring the NLRB to have a quorum of three to decide cases).

<sup>223</sup> See 29 U.S.C. § 160(f) (2012) (establishing the process for appeals to NLRB decisions); see also Lee III & Willging, *supra* note 62, at 770 (justifying that parties may not want to appeal because of the high cost of entering the federal court system).

expectation is changing and the trust that parties once had in the NLRB is dwindling.<sup>224</sup>

This loss of trust could cause parties to cast doubt on the NLRB's decisions, which in turn could cause parties additional stress, time, and money in the long run.<sup>225</sup> For example, if the NLRB holds that an employer wrongfully discharged an employee based on a collective bargaining agreement interpretation, that employee will have his or her job reinstated and possibly receive back-pay.<sup>226</sup> Months later, after the employer and employee have both made adjustments, they are informed that the NLRB did not have a valid quorum to decide this case.<sup>227</sup> This invalidation could trigger the employer to appeal the holding, which would not only cost parties time and money, but would place the employee in a state of limbo until the NLRB reexamines the case.<sup>228</sup> In the end, the NLRB caused the parties more stress, more money, and gave them doubt in the NLRB's future decisions.<sup>229</sup>

#### 4. History Repeats Itself

There have been several instances when the NLRB's membership fell below three.<sup>230</sup> History is known to repeat itself, so there is a likely chance that the NLRB's membership will fall again.<sup>231</sup> The decline of the NLRB's membership was only a small problem in the past because the President

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<sup>224</sup> See *supra* Part II.E.1 (explaining the cases which were invalidated).

<sup>225</sup> See McCULLOCH & BORNSTEIN, *supra* note 30, at 116–17 (confirming that most federal courts will uphold NLRB decisions); see also *supra* note 65 and accompanying text (commenting how appealing to a federal circuit court can cause more problems).

<sup>226</sup> See *Piedmont Gardens*, 359 N.L.R.B. No. 46, 2012–13 NLRB Dec. (CCH) ¶ 15668 at \*5 (Dec. 15, 2012) (requiring an employer to turn over the names of witnesses who reported a nurse sleeping on the job in order to justify firing her). This scenario is based off of *Piedmont Gardens* with some added facts to fit the scenario. *Id.* at \*1–2.

<sup>227</sup> See *New Process Steel*, 560 U.S. at 688 (holding that the NLRB must have a three member quorum to decide cases).

<sup>228</sup> See McCULLOCH & BORNSTEIN, *supra* note 30, at 118 (noting that appealing to a federal court puts both the employer and the employee in limbo); see also Lee III & Willging, *supra* note 62, at 770 (describing that appealing to a federal court can cost between \$15,000 and \$20,000).

<sup>229</sup> See *supra* Part III.A.3 (elaborating on citizens' trust in the NLRB). *Piedmont Gardens* was on appeal and has finally been reexamined by the NLRB. *Piedmont Gardens*, 359 N.L.R.B. No. 46, 2012–13 NLRB Dec. (CCH) ¶ 15668 at \*5 (Dec. 15, 2012) (adding that this case was appealed in June 2013 and was not reexamined by the NLRB until June 2015); *Piedmont Gardens*, 362 N.L.R.B. No. 139, 2015 WL 4179692 at \*8 (June 26, 2015) (affirming the previous ruling).

<sup>230</sup> See MEMBERS OF THE NLRB SINCE 1935, *supra* note 11 (showing the amount of members on the Board every year since the Board's creation).

<sup>231</sup> See Millhisser, *supra* note 4 (“When the current members terms expire, however, a Supreme Court decision gutting the recess appointments power could make it impossible to fill the NLRB's vacant seats.”).



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had the power to recess-appoint members if the Senate did not agree on his nomination.<sup>232</sup> Now, however, the problem of a declining membership will be more difficult to fix because recess appointment power is limited.<sup>233</sup>

If the NLRB's membership falls below three members, it does not have a quorum to decide cases according to *New Process Steel*.<sup>234</sup> Without a way to decide cases, the NLRB cannot help employers, employees, or unions with their labor and employment issues.<sup>235</sup> This decline in membership leaves the parties with no choice but to appeal to federal court if they are unhappy with the regional NLRB's decision.<sup>236</sup> As a result, this decline would cause the federal courts to be flooded with labor and employment issues.<sup>237</sup>

The federal courts are not experts in labor and employment law.<sup>238</sup> If the federal courts handled every appeal to a regional NLRB decision, it would defeat the purpose of having an administrative agency that has an expertise in labor and employment law.<sup>239</sup> The federal courts already handle a multitude of issues and are overburdened by other cases.<sup>240</sup> If the courts added labor and employment issues to the list of cases they must handle, these issues would further congest the court system.<sup>241</sup> In addition, if parties appeal cases to the federal courts, the cost and time

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<sup>232</sup> See *id.* (explaining that without recess appointment power, filling NLRB seats will be even more difficult); see also U.S. CONST. art. II, § 2, cl. 3 (displaying the Recess Appointments Clause).

<sup>233</sup> See *NLRB v. Canning*, 134 S. Ct. 2550, 2566, 2575 (2014) (analyzing that recess appointments are allowed only when the Senate has taken a break for longer than ten days, and the Senate gets to declare when it is in session).

<sup>234</sup> See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 679–88 (2010) (holding that three members constitutes a quorum for the NLRB).

<sup>235</sup> See 159 CONG. REC. S302 (daily ed. Jan. 28, 2013) (statement of Sen. Lamar Alexander) (stating that without three members, the NLRB cannot decide cases or issue regulations).

<sup>236</sup> See MCCULLOCH & BORNSTEIN, *supra* note 30, at 116–20 (explaining the NLRB's relation to the federal courts).

<sup>237</sup> See Jamieson, *supra* note 160 (arguing that the Senate's bill will "create new burdens on already clogged federal courts that lack the NLRB's expertise on labor relations"); see also *supra* note 65 and accompanying text (establishing the argument that federal courts could become overburdened without a national level to the NLRB).

<sup>238</sup> See Dotan, *supra* note 63, at 1022 (noting that administrative agencies have more expertise than Federal Courts); see also MCCULLOCH & BORNSTEIN, *supra* note 30, at 116–17 (admitting that because federal courts are not experts in labor and employment law they rarely change NLRB rulings).

<sup>239</sup> See Kahlenberg & Marvit, *supra* note 80, at 226 (arguing that without the NLRB "the effect on workers would be dramatic" because there would be no one with an expertise in enforcing the NLRA).

<sup>240</sup> See *Introduction*, *supra* note 65, at 685 (describing that the overburdening of the federal court system leads to delay and more expenses).

<sup>241</sup> See *id.* (discussing the overburdening of the federal court system).

parties spend on each case will increase.<sup>242</sup> Thus, without the NLRB to decide cases, both parties involved in the conflict and the federal court system would be unduly burdened.

The future of the NLRB is in jeopardy.<sup>243</sup> If there is not a change to the NLRB's enabling statute in the future, the NLRB could face membership decline to the point of extinction.<sup>244</sup> This amendment to the NLRB's enabling statute is important to not only keep the NLRB operational, but also to protect employee, employer, and union rights.<sup>245</sup> The NLRB was created to provide expertise in labor and employment law and this Note proposes a solution to ensure that expertise can still be exercised.<sup>246</sup>

#### *B. The Senate's Proposed Bill is Not a Solution to the NLRB's Problems*

In short, the Bill is an amendment that would obstruct the NLRB's function in the future.<sup>247</sup> Although the NLRB needs a change, the Bill is not the solution to the NLRB's problems because it will end in a nonfunctional Board.<sup>248</sup> The Senate's Proposed Bill would amend the NLRB to function much like the Federal Election Commission, which has been known as one of the most ineffective administrative agencies due to its gridlock and inaction.<sup>249</sup> There are many reasons why the Bill is not a solution to the NLRB's problems, such as: gridlock in decision-making,

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<sup>242</sup> See Lee III & Willging, *supra* note 62, at 770 (stating that the average median cost for taking a civil case to federal court is \$15,000 for the plaintiff and \$20,000 for the defendant).

<sup>243</sup> See *NLRB v. Canning*, 134 S. Ct. 2550, 2566, 2575 (2014) (eliminating most recess appointment power); see also *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 679–88 (2010) (requiring three members for a quorum).

<sup>244</sup> See Millhiser, *supra* note 4 (“Ultimately, the fate of the NLRB—and of American labor law—will hinge upon who controls the Senate and the White House. If both the president and the Senate want America to continue to have labor law in 2018, then confirming new NLRB members should not be an issue.”).

<sup>245</sup> See *infra* Part III.C (describing the change the NLRB needs to make to its enabling statute). See also Kahlenberg & Marvit, *supra* note 80, at 226 (explaining the effect on workers when the NLRB is extinct). A former Chairman on the NLRB and a current Stanford Law professor said that if there was no NLRB “[w]orkers illegally fired for union organizing won’t be reinstated with back pay. Employers will be able to get away with interfering with union elections. Perhaps most important, employers won’t have to recognize unions despite a majority vote by workers.” *Id.*

<sup>246</sup> See *infra* Part III.C (elaborating on the proposed solution to the NLRB's problems).

<sup>247</sup> See *supra* Part II.E.2 (establishing the components of the Bill).

<sup>248</sup> See S. 2814, 113th Cong. (2014) (showing the elements of the Bill); see also *supra* Part II.E.2 (noting the components of the Bill).

<sup>249</sup> See 2 U.S.C. § 437c(a) (2012) (explaining the Federal Election Commission's structure); Franz, *supra* note 154, at 167 (stating that the Federal Election Commission is one of the most ineffective agencies and was designed by Congress to be slow and ineffective); see also Mahoney, *supra* note 152 (commenting that the Bill transforms the NLRB to the same organization as the Federal Election Commission).

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possible loss of funding, and a harsher appointment quota and standard.<sup>250</sup>

One of the reasons the Bill will not fix the NLRB's current problems is that this change will create gridlock.<sup>251</sup> The Bill requires two members from each party to agree on a solution, which would be a difficult, if not an impossible task for the NLRB.<sup>252</sup> As previously stated, the NLRB must take either the employee or management side, and it is known that many employment rights supporters and management supporters do not agree.<sup>253</sup> Therefore, it is highly unlikely that members who support opposite views would agree on any issue.<sup>254</sup> In addition, it is rare for parties to make decisions against party lines.<sup>255</sup> For example, Congress often goes into gridlock because parties will not vote against party lines.<sup>256</sup> Creating gridlock on the NLRB will be detrimental to its operation because even with a full board, decisions will not be made if the parties cannot agree.<sup>257</sup>

The Bill will also hinder the NLRB because it could cause the NLRB to lose its funding.<sup>258</sup> If the NLRB does go into gridlock on some decisions,

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<sup>250</sup> See *infra* Part II.E.2 (displaying the components of the Bill).

<sup>251</sup> Compare S. 2814, 113th Cong. § 2(b)(1) (noting the requirement that two Democrat members and two Republican members be in favor of the vote in order for it to go through), with Phenicie, *supra* note 127 (stating that an even number of Republican and Democrat members creates gridlock).

<sup>252</sup> See S. 2814, 113th Cong. § 2(a)(1)(C) (explaining the requirements of the agreement of the Senate and the President to appoint members to the NLRB).

<sup>253</sup> See McCULLOCH & BORNSTEIN, *supra* note 30, at 176 (reasoning that the conflict between union and management will not end any time soon). Critics argue that:

Although one might wish that labor and management could find a common ground in accepting both the statutory rules that Congress has laid down in the Labor Act and the Board's role as impartial arbiter of those rules, there is little evidence that partisan bickering and hostility will soon disappear.

*Id.*; see also Jamieson, *supra* note 160 (adding that "[a] permanent, even split along partisan lines" would allow "contentious labor cases" to go on for a long time and this is comparable to "establishing a 10-member Supreme Court, permanently comprised of five liberals and five conservatives").

<sup>254</sup> See McCULLOCH & BORNSTEIN, *supra* note 30, at 176 (discussing that it seems unlikely that parties will find a common ground).

<sup>255</sup> See Mann, *supra* note 152 (stating that Congress is reflecting ideological differences and creating more gridlock).

<sup>256</sup> See Blake, *supra* note 152 ("[T]he percentage of gridlocked . . . issues has more than doubled since 1950 and is close to a new high . . .").

<sup>257</sup> See S. 2814, 113th Cong. § 2(b)(1) (explaining that two members from either party must agree on a holding); see also Gerhards, *supra* note 153 (commenting on the portions of the Bill).

<sup>258</sup> See S. 2814, 113th Cong. § 20(a) (declaring that the NLRB must decide ninety percent of its cases within the first year in order to maintain its normal funding).

it will run the risk of losing twenty percent of its funding.<sup>259</sup> This scenario could happen easily because ten percent is a small number of cases to disagree about.<sup>260</sup> For example, if the NLRB handled 500 cases during the year after this amendment is passed, it would only need to be gridlocked on fifty-one cases to lose twenty percent of its funding.<sup>261</sup> When any agency loses funding, it has fewer resources to accomplish its goals.<sup>262</sup>

Finally, the Bill is not the solution the NLRB needs because it would require even more members to be appointed with a harsher appointment standard.<sup>263</sup> The NLRB has a history of struggling to maintain enough members for a quorum of three.<sup>264</sup> However, the Bill raises that requirement to four members for a quorum.<sup>265</sup> This provision means that the quorum requirement will not only be hard to meet because members might not agree, but also because membership could very easily fall below four.<sup>266</sup> In addition, the Bill requires the President and Senate to agree two times in order for a member to be appointed.<sup>267</sup> *NLRB v. Canning* arose because the Senate and President could not agree on appointing members to the NLRB, and in that instance the President and Senate only needed to agree once.<sup>268</sup> This feat was difficult then, and it will be nearly impossible for them to agree twice.<sup>269</sup>

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<sup>259</sup> See *id.* (requiring the decision of ninety percent of cases within the first year, or there will be a loss of twenty percent funding).

<sup>260</sup> See Jamieson, *supra* note 160 (articulating that this funding would be easy to lose because a “dead-even partisan split” would make it even more difficult to reach decisions).

<sup>261</sup> See S. 2814, 113th Cong. § 20(a) (establishing percentage requirements to lose funding).

<sup>262</sup> See *id.* (promoting the decrease in funding of the NLRB); see also H.R. 1, 112th Cong. (2011) (calling for an eighteen percent decrease in the NLRB’s budget).

<sup>263</sup> See S. 2814, 113th Cong. § 2(a)(C) (creating the new requirements for appointment).

<sup>264</sup> See MEMBERS OF THE NLRB SINCE 1935, *supra* note 11 (depicting the NLRB’s membership since the Board’s creation).

<sup>265</sup> See S. 2814, 113th Cong. § 2(a)(1)(B)–(C) (stating the new membership requirement of six members).

<sup>266</sup> See Shapiro et al., *supra* note 114 (predicting that the next time a vacancy is not filled because the President and Senate do not agree, there could be problems).

<sup>267</sup> See S. 2814, 113th Cong. § 2(a)(1)(C) (requiring the President to consult the opposite party leader in the Senate for appointment and for the Senate to consent to the nomination).

<sup>268</sup> See *NLRB v. Canning*, 134 S. Ct. 2550, 2557 (2014) (highlighting why the invalidated members were on the Board and showing why President Obama used the recess appointment power); see also U.S. CONST., art. II, § 2, cl. 2 (explaining that the Senate must confirm presidential appointments).

<sup>269</sup> See *Canning*, 134 S. Ct. at 2557 (limiting the President’s recess appointment power); see also Bolton, *supra* note 103 (commenting that the reason President Obama had to use recess appointment power was because the Senate continually refused to confirm his appointments, and the Senate even conducted *pro forma* sessions to prevent recess appointments).

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If passed, the Bill will turn the NLRB into a non-functional administrative agency similar to the Federal Election Commission.<sup>270</sup> It imposes requirements on the NLRB that, based on the Board's history, would be impossible to achieve.<sup>271</sup> Overall, the Bill is not a solution; it is a plan to dissolve the NLRB altogether.<sup>272</sup>

C. *A Solution for the Future*

The NLRB should use the FCC's model to rewrite its enabling statute.<sup>273</sup> The agencies are similar in structure and both are experts in their respective areas of law, which require regulation.<sup>274</sup> In addition, the FCC has never had a membership issue.<sup>275</sup> The FCC's enabling statute, in pertinent part, states:

[C]ommissioners shall be appointed for terms of five years and until their successors are appointed and have been confirmed and taken the oath of office, except that they shall not continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office . . . .<sup>276</sup>

The NLRB's enabling statute does not have a provision which extends a member's term until a new member is appointed.<sup>277</sup> This Note recommends an amendment to the NLRB's enabling statute that includes this language.<sup>278</sup>

First, Part III.C.1 establishes the amendment that Congress should make to the NLRB's enabling statute.<sup>279</sup> Next, Part III.C.2 addresses the

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<sup>270</sup> See Franz, *supra* note 154, at 167 (establishing why the Federal Election Commission is an ineffective commission). The Federal Election Commission has gone into gridlock many times and rarely makes any decisions. *Id.* In addition, it seems as though it was organized this way in order to make sure it was unable to act. *Id.*

<sup>271</sup> See *supra* Part II.A (reviewing the history of the NLRB); see also S. 2814, 113th Cong. (showing the requirements the Bill imposes).

<sup>272</sup> See S. 2814, 113th Cong. (displaying the Bill); see also Jamieson, *supra* note 160 ("This is the destruction of the NLRB, and they know it . . . .") (internal quotations omitted).

<sup>273</sup> See *supra* Part II.F (explaining the FCC and its organizational structure).

<sup>274</sup> See *supra* note 168 and accompanying text (comparing the functions of the NLRB and FCC).

<sup>275</sup> See FEDERAL COMMUNICATIONS COMMISSION, COMMISSIONERS FROM 1934 TO PRESENT, <http://www.fcc.gov/leadership/commissioners-1934-present> [http://perma.cc/L2F9-946M] (discussing the continuing membership of the FCC).

<sup>276</sup> 47 U.S.C. § 154(c) (2012).

<sup>277</sup> See 29 U.S.C. § 153(a) (2012) (illustrating the provisions of the NLRB's enabling statute).

<sup>278</sup> See *infra* Part III.C.1 (explaining the language that should be added to the NLRB's enabling statute).

<sup>279</sup> See *infra* Part III.C.1 (stating the text which should be added to 29 U.S.C. § 153 (2012)).

commentary and possible counterarguments regarding this amendment.<sup>280</sup> Overall, this amendment would be an immediate and long-term solution to the NLRB's operational problem.<sup>281</sup>

#### 1. Proposed Amendment to 29 U.S.C. § 153

Amending the NLRB's enabling statute will allow the NLRB to maintain a larger membership for a longer period of time and help to dissolve any possible gridlock with the election of a new Senate.<sup>282</sup> The enabling statute with the amendment will state:

(a) Creation, composition, appointment, and tenure;  
Chairman; removal of members

The National Labor Relations Board (hereinafter called the "Board") created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947 [29 U.S.C. § 141 et seq.], is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. *If, when a board member's term is set to expire, a new board member has not yet been appointed, then the current board member shall extend his term until a new member is appointed, except that his term shall not extend beyond the end of the next congressional session.* The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.<sup>283</sup>

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<sup>280</sup> See *infra* Part III.C.2 (addressing the counterarguments to this Note's solution).

<sup>281</sup> See *supra* Part II.C–D (describing two times in which the NLRB was unable to function).

<sup>282</sup> See 29 U.S.C. § 153(a) (displaying the current enabling statute of the NLRB). This Note proposes changes to the current form of this statute.

<sup>283</sup> The regular portion of the text comes from 29 U.S.C. § 153(a). The italicized portion of the text represents the additions made by the author. In addition, 29 U.S.C. § 153(b)–(d) are

## 2. Commentary

This amendment is a proven solution of other independent agencies, and it will be the best solution to the NLRB's membership problems.<sup>284</sup> Most importantly, the proposed amendment allows the NLRB to meet its quorum requirement for longer periods of time.<sup>285</sup> When a member's term ends after five years, if the President and Senate have not agreed upon a new member, the old member will stay on the NLRB and continue working.<sup>286</sup> This extension would end at the earlier of either: (1) the Senate and President agreeing on a new member; or (2) the end of the next congressional session.<sup>287</sup> This process allows for a new Congress to be elected, the possibility of a change in Congress' political majority, and more time for the President and Senate to reach an agreement on a new member.<sup>288</sup>

This amendment is also necessary because the intent when creating the NLRB was not for it to be inactive, but for it to be able to aid the people of this country and the bodies of government by deciding and administering the labor laws of the country.<sup>289</sup> The NLRA created the NLRB for the purpose of enforcing the provisions of the NLRA, and it is

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recommended to remain the same.

<sup>284</sup> See Borkoski, *supra* note 166 (stating that a holdover provision has worked with other agencies). It is important that this solution is implemented as soon as possible because next year is when members' terms begin to end and without this amendment and recess appointments, there is a chance that no one will be appointed to the NLRB. See *id.* (opining that appointments will be difficult in the future).

<sup>285</sup> See *New Process Steel, L.P.*, 560 U.S. 674, 679–88 (2010) (holding that three members constitute a quorum for the NLRB).

<sup>286</sup> See *supra* Part III.C.1 (displaying the proposed amendment to 29 U.S.C. § 153(a)).

<sup>287</sup> See 47 U.S.C. § 154(c) (2012) (establishing the FCC's power as a commission). This proposed amendment is modeled off of the language from the FCC's enabling statute. See 47 U.S.C. § 154(c) (showing the language that makes up the FCC's enabling statute).

<sup>288</sup> See Borkoski, *supra* note 166 (discussing that allowing for a holdover period would help the NLRB to fix its problems). Although this solution does not fix the problems of recess appointments and the President and Senate not agreeing on an appointee, it does give the NLRB more time and allows for a new Congress to be elected, which could solve the disagreement between the President and Senate. *Id.*

<sup>289</sup> See McCULLOCH & BORNSTEIN, *supra* note 30, at 16–20 (explaining the creation of the NLRB). If the NLRB were to cease to exist:

[T]here will be no one to enforce workers' rights to join a union without intimidation from their employer. No one to enforce workers' rights to join together to oppose abusive work conditions. And no one to make an employer actually bargain with a union. Without an NLRB to enforce the law, it may be possible for an employer to round up all of their pro-union workers, fire them, and then replace them with anti-union scabs who will immediately call a vote to decertify the union.

Millhisser, *Nuclear Option*, *supra* note 14; see also *supra* Part II.A (examining the history of the NLRB).

imperative that the NLRB have the power to do so.<sup>290</sup> Without an enforcement board, the NLRA would not be followed and employees would not have any guarantees in their rights.<sup>291</sup>

This amendment is the best solution to solve the NLRB's membership problems because it can be easily implemented and it is a small change that will have a large impact on the NLRB.<sup>292</sup> The amendment simply adds one sentence to the NLRB's enabling statute.<sup>293</sup> It would not change the appointment process, and it would not take any power away from either the Senate or the President.<sup>294</sup> This change will allow the NLRB to decide more cases with a valid board and will encourage the Senate to negotiate with the President prior to the end of the next congressional session.<sup>295</sup> Overall, this small change could have a large impact on the NLRB's operation.<sup>296</sup>

Critics may argue that the Bill is a better solution than this amendment because it will "take the politics out of it" and turn the NLRB into an umpire.<sup>297</sup> Although the Bill may require Republican and Democratic members of the NLRB to find common ground on some issues, it will most likely gridlock the NLRB on controversial or difficult issues.<sup>298</sup> The solution this Note proposes still allows for the Senate to check the President's nomination by voting either for it to pass or sending it back to

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<sup>290</sup> See National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (creating the original NLRA); see also S. 1958, 74th Cong. (1935) (highlighting that the intent to create the NLRB was to enforce the NLRA).

<sup>291</sup> See Millhiser, *Nuclear Option*, *supra* note 14 (arguing that without an NLRB there would be no one to enforce the proper treatment of workers); see also MCCULLOCH & BORNSTEIN, *supra* note 30, at 18 (stating that President Roosevelt commented that the NLRB will create a better relationship between employees and employers).

<sup>292</sup> See *The Legislative Process*, *supra* note 15 (explaining how a statute is amended). First, a bill must be proposed which is structured similar to the Senate's bill. *Id.* The bill must pass a majority vote in both the House of Representatives and the Senate. *Id.* Last, the President must sign the bill and then 29 U.S.C. § 153(a) will be amended. *Id.*

<sup>293</sup> See *supra* note 283 and accompanying text (displaying the proposed sentence that should be added to the NLRB's enabling statute).

<sup>294</sup> See U.S. CONST. art. II, § 2, cl. 2 (mandating both the President and Senate confirm an appointment to an administrative agency).

<sup>295</sup> See Borkoski, *supra* note 166 (suggesting that a holdover period after the end of someone's term may help to fix the NLRB's membership problems); see also FEDERAL COMMUNICATIONS COMMISSION, *supra* note 275 (displaying the FCC's membership from the time it was created). The amendment is modeled off of the language from the FCC's enabling statute. See 47 U.S.C. § 154(c) (2012) (showing the FCC's enabling statute).

<sup>296</sup> See MEMBERS OF THE NLRB SINCE 1935, *supra* note 11 (illustrating all the vacancies the NLRB has had).

<sup>297</sup> See Cox, *supra* note 152 (arguing that the Bill is a good solution).

<sup>298</sup> See Jamieson, *supra* note 160 ("It is possible that on some issues, the six members might find a common ground, in the interest of deciding cases, . . . [b]ut for anything novel, controversial or difficult, it is hard to see how they would find a way forward. They would spend a lot of time negotiating, I guess. Or at war.") (internal quotations omitted).



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the President.<sup>299</sup> The Bill will cause cases to be unresolved for years and could possibly result in a loss of twenty percent of the funding if there is gridlock.<sup>300</sup> Therefore, the proposed amendment to the NLRB's enabling statute this Note proposes is a better solution because it will allow more time for less-partisan members to be appointed – which satisfies the Bill's goal of less partisanship on the board – and will not threaten the NLRB's dissolution by creating more gridlock.<sup>301</sup>

Furthermore, critics may argue that this amendment will only delay the possible bad times where the NLRB will not have enough members to operate. This argument is flawed because it does not consider that by delaying the end to a member's term, there could be a change in the composition of the Senate, which would allow for agreement on a new appointment.<sup>302</sup> In addition, this amendment allows the NLRB more time to make decisions on cases regarding unfair labor practices.<sup>303</sup> In short, this amendment does not delay bad times; it proposes a practical solution to the NLRB's membership problem.<sup>304</sup>

Finally, critics may argue that the NLRB's dissolution might not be a bad thing, considering the Board's inactivity. If this were true and the NLRB was dissolved, the United States would revert back to the times before the NLRB was created.<sup>305</sup> Before the NLRB was created, many corporations and unions resorted to violence to solve their problems and employees were voiceless in their workplaces.<sup>306</sup> Without the NLRB, employees would have to go to the federal courts about their problems in the workplace, which takes much more time and money for both the employee and the courts.<sup>307</sup> Although the NLRB has lost its quorum a few times within the past five years, it has still been there to remedy those situations, and without the NLRB, employees would have no guarantee of

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<sup>299</sup> See U.S. CONST. art. II, § 2, cl. 2 (requiring both the President and Senate to agree on a presidential appointment to an agency).

<sup>300</sup> See S. 2814, 113th Cong. § 20(a) (2014) (establishing that two Republicans and two Democrats must agree on every decision passed and if ninety percent of the cases are not decided within a year the NLRB will lose twenty percent of its funding); see also Jamieson, *supra* note 160 (scrutinizing that the Bill is not a solution to the NLRB's problems).

<sup>301</sup> See *supra* Part III.C.1 (explaining the amendment to the NLRB's enabling statute).

<sup>302</sup> See *supra* Part III.C.1 (displaying that a member's term shall not end until someone else is appointed or until the end of the next congressional session, whichever is sooner).

<sup>303</sup> See *supra* Part II.F (expanding on how this works with the FCC); see also *supra* Part III.C.1 (showing the amendment to the NLRB's enabling statute).

<sup>304</sup> See MEMBERS OF THE NLRB SINCE 1935, *supra* note 11 (establishing the members on the NLRB and how many vacancies and recess appointments the Board has had).

<sup>305</sup> See *supra* Part II.A (describing the history of the NLRB).

<sup>306</sup> See MCCULLOCH & BORNSTEIN, *supra* note 30, at 184–85 (asserting that the NLRB fixed problems with violence and workers being heard in the workplace).

<sup>307</sup> See *supra* notes 238–42 and accompanying text (explaining the reasons why federal courts would be overburdened and are not experts in administrative law).

their rights.<sup>308</sup> Overall, the proposed amendment to 29 U.S.C. § 153 is the best solution to solve the NLRB's membership problems.<sup>309</sup>

#### IV. CONCLUSION

Every agency is created for a reason—the NLRA created the NLRB because it needed an agency to enforce the rights the NLRA guarantees.<sup>310</sup> The NLRB is on the verge of extinction because there have been two major instances in the past five years that have rendered the agency powerless.<sup>311</sup> The current NLRB members' terms will end at varying points from now until 2018, and if no amendment is made to the NLRB's enabling statute, there will be more opportunities for the NLRB to lose its quorum.<sup>312</sup> Amending the NLRB's enabling statute is a minor change to allow membership to extend for a longer period of time.<sup>313</sup> If this change is implemented, Grace, the teacher from Part I, will have a way to appeal to the NLRB and possibly get her job back.<sup>314</sup> This solution would not only give the NLRB more time to operate, but also more time for the President and Senate to agree on a nomination.<sup>315</sup> The NLRB needs a change and the proposed amendment will allow it to withstand the disagreement in appointing members.<sup>316</sup>

Elizabeth Littlejohn\*

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<sup>308</sup> See *supra* notes 238–42 and accompanying text (showing the effect of more cases on the federal courts). See also *supra* Part II.C–D (showing the two times in the past five years the NLRB has lost its quorum).

<sup>309</sup> See *supra* note 283 and accompanying text (resolving the NLRB's problems); see also *supra* Part III.C.2 (evaluating why the solution this Note proposes is the best solution).

<sup>310</sup> See *supra* Part II.A (expanding on the creation of the NLRB).

<sup>311</sup> See *supra* Part II.C–D (describing both of the cases that caused the NLRB to be powerless).

<sup>312</sup> See *supra* Part III.D (enabling the NLRB to act for a longer period of time).

<sup>313</sup> See *supra* Part III.C.1 (showing the proposed amendment to the NLRB's enabling statute).

<sup>314</sup> See *supra* Part I (establishing the fictional scenario involving Grace).

<sup>315</sup> See *supra* Part III.C (examining the amendment and the counterarguments and defenses).

<sup>316</sup> See *supra* Part III.C.2 (arguing why the proposed amendment is a good solution against all the counterarguments).

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